FILED
JAN 26 1972
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-956

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN; VERNON RANDALL OSTLER, a minor by STEPHEN OSTLER, his father and natural guardian; MARCK CHARLES SIMMONS, by and through his guardian ROBERT C. SIMMONS,

Petitioners,

—v.—

ALMON FLAKE, *et al.*,

Respondents.

AL WHITE, a minor by his father, V. T. WHITE,

Petitioner,

—v.—

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, *et al.*,

Respondents.

GREGORY A. CRANSON and RANDALL J. CRANSON, minors, by and through their natural guardian, WALTER N. CRANSON,

Petitioners,

—v.—

EAST OTERO SCHOOL DISTRICT R-1, *et al.*,

Respondents.

GARY CHRISTMAS, a minor by his father and next friend, WILLIAM R. CHRISTMAS,

Petitioners,

—v.—

THE EL RENO BOARD OF EDUCATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PAUL A. PHILLIPS
520 Simms Building
Albuquerque, New Mexico 87101

DAN MCKINNON, III
608 First National Bank Building
Albuquerque, New Mexico 87101

STEPHEN F. WILLIAMS
Fleming Law 205
University of Colorado
Boulder, Colorado 80302

PHILIP F. HORNING
903 First National Bank Building
Oklahoma City, Oklahoma 73102

JAMES N. BARBER
716 Newhouse Building
Salt Lake City, Utah 84111
Of Counsel

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010
Attorneys for Petitioners

INDEX

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Question Presented	3
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Freeman v. Flake	4
White v. Board of Education of Hobbs Municipal School District No. 16	5
Cranson v. East Otero School District R-1	6
Christmas v. The El Reno Board of Education	7
Reasons for Granting the Writ	9
CONCLUSION	13
APPENDIX	
Opinions of the United States Court of Appeals for the Tenth Circuit	1a
Opinion of the United States District Court for the District of Utah in *Freeman et al.* v. *Flake, et al.*	11a
Opinion of the United States District Court for the District of New Mexico in *White* v. *Board of Education of Hobbs Municipal School District*	28a

PAGE

Opinion of the United States District Court for the District of Colorado in *Cranson* v. *East Otero School District R-1, et al.* 36a

Opinion of the United States District Court for the Western District of Oklahoma in *Christmas* v. *The El Reno Board of Education* 41a

AUTHORITIES CITED

Cases:

Alberda v. Noell, 322 F. Supp. 1379 (E.D. Mich. 1971) 9

Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971) 9, 12
Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970) 9

Coates v. City of Cincinnati, 402 U.S. 611, 29 L. Ed.2d 214 (1971) 11
Crews v. Clones, 432 F.2d 1259 (7th Cir. 1970) 11

Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1969) 9
Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971) 9

Gere v. Stanley, —— F.2d —— (3rd Cir. 1971, No. 71-1025) 9

Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970) 9

King v. Saddleback Junior College District, 445 F.2d 932 (9th Cir.), *cert. denied*, 40 U.S.L.W. 3249 (1971) 9

PAGE

Lansdale v. Tyler Junior College, 318 F. Supp. 529 (E.D. Tex. 1970) 9
Lewis v. Kugler, 446 F.2d 1343 (3rd Cir. 1971) 11

Meyer v. Nebraska, 262 U.S. 390 (1923) 12

Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) 9
Roberts v. General Food Co., —— F. Supp. ——, 40 U.S.L.W. 2188 (N.D Ohio 1971) 11

Constitutional Provisions:

United States Constitution
First Amendment 3
Fourth Amendment 3
Ninth Amendment 3
Fourteenth Amendment 3

Statutes:

28 U.S.C. §1254(1) 2
28 U.S.C. §1343 4
42 U.S.C. §1983 ..... 3, 4

Other Authorities:

1 *Corinthians* 11:14 10
Leviticus, 19:27 10
Severn, The Long and Short of It (David McKay Co., 1971) 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN; VERNON RANDALL OSTLER, a minor by STEPHEN OSTLER, his father and natural guardian; MARCK CHARLES SIMMONS, by and through his guardian ROBERT C. SIMMONS,

Petitioners,

—v.—

ALMON FLAKE, *et al.*,

Respondents.

AL WHITE, a minor by his father, V. T. WHITE,

Petitioner,

—v.—

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, *et al.*,

Respondents.

GREGORY A. CRANSON and RANDALL J. CRANSON, minors, by and through their natural guardian, WALTER N. CRANSON,

Petitioners,

—v.—

EAST OTERO SCHOOL DISTRICT R-1, *et al.*,

Respondents.

GARY CHRISTMAS, a minor by his father and next friend, WILLIAM R. CHRISTMAS,

Petitioners,

—v.—

THE EL RENO BOARD OF EDUCATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in these cases on September 28, 1971.

Citations to Opinions Below

The opinions of the respective United States District Courts for the Districts of Utah, New Mexico, Colorado and the Western District of Oklahoma are set forth in the Appendix, *infra*, at pp. 11a-27a (*Freeman et al. v. Flake, et al.*), pp. 28a-35a (*White v. Board of Education of Hobbs Municipal School District No. 16*), pp. 36a-40a (*Cranson v. East Otero School District R-1, et al.*) and pp. 41a-52a (*Christmas v. The El Reno Board of Education, et al.*). The *Freeman* and *Christmas* opinions are reported at 320 F. Supp. 531 and 313 F. Supp. 618, respectively.

The consolidated opinion of the United States Court of Appeals for the Tenth Circuit is reported at 448 F.2d 258 and is set forth in the Appendix, *infra* at pp. 1a-10a.

Jurisdiction

The judgments of the United States Court of Appeals were entered on September 28, 1971. On December 14, 1971, Mr. Justice White signed an order extending the time within which to file this petition to and including January 26, 1972. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254 (1).

Question Presented

Whether the state may constitutionally expell or punish male public school students whose hair length exceeds the limits prescribed by school officials?

Constitutional and Statutory Provisions Involved

United States Constitution,
First Amendment:

"Congress shall make no law . . . abridging the freedom of speech"

Fourth Amendment:

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . "

Ninth Amendment:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment:

" . . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case

These various cases were brought separately in United States District Courts in Utah, New Mexico, Colorado and Oklahoma as civil rights actions, pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343, to seek redress for the asserted violation of federally protected rights. The petitioners were all public school students who had been expelled, suspended or in other ways disciplined for allegedly violating school regulations requiring certain hair styles for male students. The respondents were school boards and officials in the respective districts.

Hearings were held on the petitioners' requests for declaratory and injunctive relief. In the New Mexico case *(White)*, District Judge Bratton explored the various justifications for the school rule, concluded they were inadequate and held that the board had violated the petitioner's constitutionally protected rights (App., *infra*, pp. 28a-35a). In the other three cases, the district courts sustained the regulations (App., *infra*, pp. 11a-27a, 36a-52a). The background of each of the cases is as follows.

Freeman* v. *Flake

This proceeding involved three cases consolidated for trial. Each case was brought by a male public school stu-

dent suspended for violation of the school's hair length regulations.[1] The regulations typically provided that " . . . male students shall comb and wear their hair so that it does not hang over the ears on the side and their hair must be above the eyebrows in the front" (App., *infra*, p. 19a). District Judge Christensen held hearings lasting three days. Rejecting many of the rationales offered by the school authorities (App., *infra*, p. 17a), and noting that others viewing the evidence might reach a contrary result, he concluded, nevertheless, that the regulations were a reasonable attempt "to minimize disruption and distraction in the school, promote order and safety, redirect the attention of students from an obsession with a reaction against, mere hair length . . . " (App., *infra*, p. 25a). Accordingly, he denied injunctive relief and dismissed the action.

White* v. *Board of Education of Hobbs Municipal School District No. 16

Al White was an average student in good standing at Hobbs High School, New Mexico. Shortly before graduation, he was suspended because of his hair length.[2] There was no contention that Al had been involved in any trouble because of his hair. Although the school written rule commanded male students to "wear neat and trim conventional style hair cuts only", the school officials contended that this was understood to prohibit hair from falling lower than one inch above the eyebrows, over the ears and over the collar.

---

[1] Two of the students received educational instruction at home; the third cut his hair under protest and was readmitted to school.

[2] On consent, he was reinstated and allowed to graduate.

District Judge Bratton held a trial which lasted four days. He heard evidence concerning the situation at Hobbs as well as the experience with hair regulations (or their absence) at schools throughout New Mexico. Holding that "the right to wear one's hair at any length is an aspect of personal liberty" protected by the Constitution, he proceeded to examine the various arguments offered by school authorities to justify "regulation impairing a fundamental freedom" (App., *infra*, p. 30a). To test the respondents "expressed apprehensions and concerns as to what might result from the elimination of a regulation governing the length of male hair," he heard evidence from officials at New Mexico schools which had abandoned or liberalized their rules (App., *infra*, pp. 32a-34a). He found that, far from having an adverse effect on educational objective, the elimination of such rules "actually reduces tension and enhances the learning process" (App., *infra*, p. 32a). The court concluded that there were no justifications for "the constitutional invasion which the rule requires". Accordingly, he held the rule unconstitutional and directed the respondents to expunge any reference to the suspension in petitioner's record (App., *infra*, p. 35a).

Cranson* v. *East Otero School District R-1

Gregory and Randall Cranson were good students at La Junta High School, Colorado. The school hair regulation provided: "Boys will be sent for a haircut if the hair falls over the eyes, over their eyes, or over the collar. We will still accept most styles just *be reasonable*" (App., *infra*, p. 38a). For failing to conform to this rule, both boys were expelled for the 1970-71 academic year unless they got haircuts.

District Judge Doyle held a fairly brief hearing on the petitioners request for injunctive relief. He specifically found that "the length of the hair did not create disturbances or disruptions," and that the petitioners were good students "whose individual behavior and attitudes were not affected by hair length" (App., *infra*, p. 37a). Indeed, their readmission was requested in a petition signed by one-third of the student body. However, the court also found that while there was no "disruption raucous in nature", there was evidence of "interference with the educational process" i.e., "a break-down of discipline and student attitudes of defiance" and a hampering of the physical education programs" (App., *infra*, p. 39a). Based on this evidence, the court concluded that there was a rational basis for the adoption of the regulation. The injunction was denied and the complaint dismissed. The Cranson brothers never returned to school.

Christmas* v. *The El Reno Board of Education

Gary Christmas was a senior at El Reno High School, Oklahoma during the 1969-70 school year. The school's policy was that boys whose hair fell over the their eyes, ears or collar would be barred from participation in extra-curricular activities, including commencement exercises. At various times during the year, the petitioner was informed by school officials that he would not be allowed to participate in the commencement ceremonies or receive a diploma unless his hair style conformed to the rules (App., *infra*, pp. 44a-45a). As commencement approached, the petitioner unsuccessfully appealed within the school system.

He then filed this action seeking to be allowed to participate in the graduation ceremony and receive a diploma.

A brief hearing was held by District Judge Bohanon, two days before graduation. He found that the petitioner had received an official "certificate of graduation", and that the diploma and commencement exercises were unofficial. The judge noted that petitioner had been involved in some fights and that other students had once forcibly attempted to cut petitioner's hair. Based on these factors, the court concluded that school authorities had met their burden of justifying their regulation and denied the injunction. Petitioner has never received his high school diploma.

The student petitioners in *Freeman, Cranson* and *Christmas* and the school board in *White* all appealed to the Court of Appeals for the Tenth Circuit. Three of these cases (*Freeman, Cranson* and *White*) were argued simultaneously before the same panel; *Christmas* was argued shortly thereafter. The court of appeals entered its opinions and judgments, affirming those decisions favorable to the school officials and reversing the judgment in favor of petitioner Al White and directing the dismissal of his complaint (App., *infra*, pp. 1a-10a). In reaching these results, the court of appeals held that "complaints which are based on nothing more than school regulations of the length of a male student's hair do not 'directly and sharply implicate basic constitutional values' and are not cognizable in federal courts . . ." (App., *infra*, p. 8a).

It is to review these judgments that *certiorari* is sought.

Reasons for Granting the Writ

1. As this Court must be aware, to say that there is a conflict among the Circuits on the issue of student hair regulations is a substantial understatement.[3] There are literally dozens of reported federal court decisions dealing with this issue. Judicial decisions have ranged from holdings that there is fundamental constitutional protection for a person's choice of hair style to rulings that the issue is too frivolous even to merit a federal court's attention.[4] The issue will continue to be raised so long as school boards persist in regulating the hair length of their male students and those students insist that the Constitution affords them the right to make such decisions for themselves. The Court should resolve these competing claims.

2. This disarray among the precedents reflects the fact that the underlying issues posed by hair regulations are

---

[3] To date, at least three Circuits have held that the Constitution affords male public school students a right to wear long hair. *Richards* v. *Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); *Bishop* v. *Colaw*, 450 F.2d 1069 (8th Cir. 1971). Two Circuits have taken a contrary position, deferring to the decision of local school officials. *King* v. *Saddleback Junior College District*, 445 F.2d 932 (9th Cir.) *cert. denied*, 40 U.S.L.W. 3249 (1971); *Freeman* v. *Flake*, 448 F.2d 258 (10th Cir. 1971). Two Circuits have looked to the reasonableness of the particular regulation, requiring only a minimal showing by school authorities to validate the rule. *Gere* v. *Stanley*, —— F.2d —— (3rd Cir., 12/27/71, No. 71-1025); *Jackson* v. *Dorrier*, 424 F.2d 213 (6th Cir.); *cert. denied*, 400 U.S. 850 (1970). And the Fifth Circuit, the first circuit court to speak to the issue, see *Ferrell* v. *Dallas Independent School District*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856, (1969), is currently considering the issues *en banc*.

[4] Compare, e.g., *Lansdale* v. *Tyler Junior College*, 318 F. Supp. 529 (E.D. Tex. 1970) with, e.g., *Alberda* v. *Noell*, 322 F. Supp. 1379 (E.D. Mich. 1971).

profound, for they touch upon the very relationship between the individual and the state. Such regulations are analytically no different than rules which might be made applicable to the general public. If the state may condition the right to a public education upon the length of a boy's hair, it may similarly condition the receipt of any public benefit, or perhaps even make the refusal to comply a criminally punishable offense.

Historically, governments, political or theocratic, have been concerned with and attempted to regulate personal appearance, particularly length and style of hair. See Severn, The Long and Short of It (David McKay Co., 1971). In 1500 B.C., among the laws which Moses received was, in effect, a hair regulation, although with a different content than today's: "Ye shall not round the corners of your heads neither shalt thou mar the corners of thy beard." *Leviticus,* 19:27. By the time of St. Paul, the nature of the rule had changed: "Doth not even nature itself teach you, that, if a man have long hair, it is a shame unto him?" I *Corinthians* 11:14. Centuries later Peter the Great, in an effort to westernize medieval Russia, imposed a tax on beards and mustaches. At approximately the same time, the rulers of China promulgated detailed hair regulations.

Very often governments have been pre-occupied with hair styles because they came to represent or identify particular political attitudes. Thus, for example, the English Civil War was fought between the long-haired forces of the Crown and the "Roundheads", a term used to describe the Puritans because of their hair style. During the time of the French Revolution, short-hair was viewed as a symbol of political radicalism both here and abroad. In

Bavaria, in the mid-nineteenth century, beards were outlawed as a sign of radicalism. Severn, The Long and Short of It, *supra* at 96. In the 1920's, American women adopted shorter hair styles to symbolize the new feminism of that era. In sum, "[h]istory contains many examples of regimes which have attacked and silenced their opponents by requiring conformity of hairstyle or dress." *Crews* v. *Cloncs,* 432 F.2d 1259, 1264 (7th Cir. 1970).

Many of these historical phenomena are manifest in the current controversy over long hair. In the last several years, the wearing of long hair has become *the* symbol of the youth culture, a "counter" culture which has challenged the politics, mores and life-styles of the established order. And because of this identification, long-haired males have been subjected to a variety of discriminations and harassment, public and private, official and unofficial.[5] The fact that long hair has taken on this meaning is perfectly reflected by the reaction of school boards and school officials. Time and again, in these and other cases challenging short-hair requirements, long-hair is characterized as a symbol of dissent, a badge of defiance of authority. And it is sought

[5] While most judicial attention has focused on school hair requirements, courts have taken cognizance of such discrimination in other contexts as well. See, *Lewis* v. *Kugler,* 446 F.2d 1343 (3rd Cir. 1971) (directing a trial on the claim by long-haired travelers on New Jersey's highways that they were singled out for police harassment and subjected to illegal searches); *Roberts* v. *General Food Co.,* —— F. Supp. ——, 40 U.S.L.W. 2188 (N.D. Ohio 9/21/71) (holding that the firing of a long-haired male employee constitutes prohibited sex discrimination since women employees were allowed to wear long hair); cf. *Coates* v. *City of Cincinnati,* 402 U.S. 611, 29 L.Ed.2d 214 (1971) (invalidating an ordinance because its vagueness contained "an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle or their physical appearance is resented by a majority of their fellow citizens." 29 L.Ed.2d at 218).

to be prohibited not because there is anything intrinsically disruptive or distracting about it, but, rather, because of what it is perceived to represent.

Yet state-imposed uniformity of appearance, so often a hallmark of totalitarian regimes, is inimical to our constitutional traditions, as many of the decisions upholding the students' claims have explicitly recognized. Those courts have looked to our heritage and concluded that " . . . among those rights retained by the people under our constitutional form of government, is the freedom to govern one's personal appearance." *Bishop* v. *Colaw, supra* at 1075. Our concepts "touching the relation between individual and state", see *Meyer* v. *Nebraska*, 262 U.S. 390, 402 (1923), do not allow for the kind of uniformity which these hair regulations impose. Particularly in today's crowded and impersonal society, the individual must be afforded a little "breathing space" in which to develop and nurture his personality.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioners

PAUL A. PHILLIPS
520 Simms Building
Albuquerque, New Mexico 87101

DAN MCKINNON, III
608 First National Bank Building
Albuquerque, New Mexico, 87101

STEPHEN F. WILLIAMS
Fleming Law 205
University of Colorado
Boulder, Colorado 80302

PHILIP F. HORNING
903 First National Bank Building
Oklahoma City, Oklahoma 73102

JAMES N. BARBER
716 Newhouse Building
Salt Lake City, Utah 84111

Of Counsel

January 26, 1972

Opinions of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SEPTEMBER TERM, 1971

No. 71-1007

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN, *et al.*,

Plaintiffs-Appellants,

v.

ALMON FLAKE, *et al.*,

Defendants-Appellees.

No. 71-1051

AL WHITE, a Minor, by his Father, V. T. WHITE,

Plaintiff-Appellee,

v.

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT No. 16, *et al.*,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D. C. NO. 8485)

No. 71-1072

GREGORY A. CRANSON and RANDALL J. CRANSON, Minors, by and through their Natural Guardian, WALTER N. CRANSON,

Plaintiffs-Appellants,

v.

EAST OTERO SCHOOL DISTRICT R-1, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D. C. NO. C-2550)

JAMES N. BARBER (Richard M. Day on the brief), *for Plaintiffs-Appellants in No. 71-1007.*

FELSHAW KING (William H. King on the brief), *for Defendants-Appellees in No. 71-1007.*

JOEL M. GORA and DAN MCKINNON, III (Melvin L. Wulf and Paul A. Phillips on the brief), *for Plaintiff-Appellee in No. 71-1051.*

MACK EASLEY of Easley & Reynolds, *for Defendants-Appellants in No. 71-1051.*

STEPHEN F. WILLIAMS, *for Plaintiffs-Appellants in No. 71-1072.*

BENJAMIN L. CRAIG (Peter M. Eggleston and Ralph N. Wadleigh on the brief), *for Defendants-Appellees in No. 71-1072.*

Before:

PHILLIPS, BREITENSTEIN and HILL,

Circuit Judges.

BREITENSTEIN, *Circuit Judge.*

Regulation of hair styles of male students in state public schools is becoming a matter of major concern to federal courts if one is to judge by the ever-increasing litigation on the subject or by the days of court time expended, and the lengthy briefs presented, in the cases now before us. We are convinced that the United States Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair. The problem, if it exists, is one for the states and should be handled through state procedures.

We have three cases, one each from Utah, New Mexico, and Colorado. In each, one or more students were suspended for violation of the school regulation on the length of hair of male students. Jurisdiction is asserted under 28 U.S.C. § 1343 and the claims are based on § 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983. Although the regulations differ in language, they essentially require that the hair should not hang below the collar line in the back, the ears on the side, or the eyebrows in front. The evidence need not be detailed. It is remarkably similar in each case. The students desired to express their individualities and the school boards offered justification for the regulations. No claim is made of any racial or religious discrimination. We find nothing in the record to indicate that the hair regulations were motivated by other than legitimate school concerns. The federal district courts in Utah and Colorado upheld the regulations and in New Mexico the regulation was rejected as infringing on constitutional rights.

The federal circuits are sharply divided on the constitutionality of regulations pertaining to the length of the hair of male students in state public schools. The students have prevailed in the First and Seventh Circuits. See Richards v. Thurston, 1 Cir., 424 F.2d 1281; Breen v. Kahl, 7 Cir., 419 F.2d 1034, cert. denied 398 U.S. 937; and Crews v. Clones, 7 Cir., 432 F.2d 1259. The school regulations were upheld in the Fifth, Sixth, and Ninth Circuits. See Stevenson v. Board of Education of Wheeler County, Georgia, 5 Cir., 426 F.2d 1154, cert. denied 400 U.S. 957; Ferrell v. Dallas Independent School District, 5 Cir., 392 F.2d 697, cert. denied 393 U.S. 856; Jackson v. Dorrier, 6 Cir., 424 F.2d 213, cert. denied 400 U.S. 850; Gfell v. Rickelman, 6 Cir., 441 F.2d 444; and King v. Saddleback Junior College, 9 Cir., —— F.2d ——. In Griffin v. Tatum, 5 Cir., 425 F.2d 201, the court held invalid that portion of a regulation which required that the back hair be tapered rather than blocked.

No apparent consensus exists among the lawyers for the students as to what constitutional provision affords the protection sought. Reliance is variously had on the First, Fourth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States and on the penumbra of rights assured thereby. The uncertainty of position complicates, rather than clarifies, the issue. The briefs and arguments for the students cavalierly dismiss, or entirely fail to discuss, the problem of federal intervention in the control of state schools in the absence of a direct and positive command stemming from the federal constitution. The hodgepodge reference to many provisions of the Bill of

Rights and the Fourteenth Amendment shows uncertainty as to the existence of any federally protected right.

All of the briefs for the students rely on Tinker v. Des Moines Independent Community School District, 393 U.S. 503, and Griswold v. Connecticut, 381 U.S. 479. Tinker was concerned with the suspension of three students for wearing to school black armbands to publicize their objection to Vietnam hostilities. The Court held that the conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. The Court said that the wearing of armbands was closely akin to pure speech and that, 393 U.S. 507-508:

> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment."

We believe that the effect of this statement is to eliminate hair style from any impact of the decision. The wearing of long hair is not akin to pure speech. At the most it is symbolic speech indicative of expressions of individuality rather than a contribution to the storehouse of ideas. With reference to symbolic speech, the Supreme Court said in the draft card burning cases, United States v. O'Brien, 391 U.S. 367, 376:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Recognition of the principle that neither students nor teachers "shed their constitutional rights to freedom of

speech or expression at the schoolhouse gate," 393 U.S. at 506, does not mean that the First Amendment contains an express command that the hair style of a male student in the public schools lies within the protected area.

Griswold held that a Connecticut statute forbidding the use of contraceptives violated the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights. 381 U.S. at 481-486. We agree with the Ninth Circuit that the conduct controlled by the hair style regulations "is not conduct found in the privacy of the home but in public educational institutions where individual liberties cannot be left completely uncontrolled to clash with similarly asserted liberties of several thousand others." King v. Saddleback Junior College, 9 Cir., —— F.2d ——, slip opinion p. 8 and authorities cited in note 11. A school regulation on the length of a student's hair is not comparable to a state statute regulating behavior in the privacy of a bedroom.

Perhaps the strongest constitutional argument which can be made on behalf of the students is based on the "liberty" assurance of the Due Process Clause of the Fourteenth Amendment. It was on this ground that the First Circuit held for the student in Richards v. Thurston, see 424 F.2d at 1284-1286, a case in which no justification was offered for the regulation. Reliance on justification carries with it the concept that a regulation affecting the due process guarantee of liberty depends for its validity on the reasonableness of the limitation placed on the regulated conduct. The evanescent nature of this standard is illustrated by the three cases before us. On unsurprisingly similar justifications two federal district courts upheld the regulations and one held to the contrary.

We doubt the applicability of the test of reasonableness in the determination of the nebulous constitutional rights here asserted. The issue should not turn on views of a federal judge relating to the wisdom or necessity of a school regulation controlling the length of hair worn by a male student in a state public school. In Ferguson v. Skrupa, 372 U.S. 726, 730, the Court said that the courts will not "substitute their social and economic beliefs for the judgment of legislative bodies." The same principle is pertinent to dress codes of school boards. We do not read Griswold v. Connecticut as overruling Ferguson v. Skrupa. The Griswold decision turned on the specific issues there presented. See 381 U.S. at 482.

The remedy provided by § 1983 is supplementary to any pertinent state remedy. See Monroe v. Pape, 365 U.S. 167, 183. The proliferation of litigation resulting from the expanded use of § 1983 is apparent to anyone familiar with the reported decisions of the courts of the United States. The existence of the § 1983 remedy does not require that federal courts entertain all suits in which unconstitutional deprivations are asserted. A federal constitutional question must exist "not in mere form but in substance, and not in mere assertion, but in assence and effect." Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 388, 397.

The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools. In speaking of judicial interposition in the operation of the public school systems, the Supreme Court said in Epperson v. Arkansas, 393 U.S. 97, 104:

> "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Whether the allegations of a complaint state a claim for relief is a question of law. Bell v. Hood, 327 U.S. 678, 682. Complaints which are based on nothing more than school regulations of the length of a male student's hair do not "directly and sharply implicate basic constitutional values" and are not cognizable in federal courts under the principles stated in Epperson v. Arkansas. It follows that each of the complaints with which we are concerned should have been dismissed for failure to state a claim on which relief can be granted.

The judgments of dismissal in No. 71-1007, the Utah case, and in No. 71-1072, the Colorado case, are severally affirmed. In No. 71-1051, the New Mexico case, the judgment is reversed and the case remanded with directions to dismiss.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SEPTEMBER TERM, 1971

No. 709-70

GARY CHRISTMAS, a Minor, by his Father and Next Friend, William R. Christmas,

Plaintiff-Appellant,

v.

THE EL RENO BOARD OF EDUCATION, Independent School District No. 34; Leslie F. Roblyer, as Superintendent of El Reno Public Schools; and Jerry Hutchison, as Principal of El Reno High School,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. NO. 70-263)

PHILIP F. HORNING (Bulla & Horning, Vance Raye and Melvin L. Wulf, and Merton M. Bulla, Of Counsel, on the brief), *for Plaintiff-Appellant.*

RICHARD M. FOGG and HARVEY L. HARMON (Fogg & Fogg and Franklin, Harmon & Satterfield, and Rupert M. Fogg, Of Counsel, on the brief), *for Defendants-Appellees.*

Before:

BREITENSTEIN, HILL and BARRETT,

Circuit Judges.

PER CURIAM.

By his complaint plaintiff-appellant Christmas attacked the constitutionality of a school regulation pertaining to the length of a student's hair. The district court denied declaratory and injunctive relief. The facts differ from Freeman v. Flake and other hair cases decided this day in that the student was not suspended but was refused the right to attend commencement exercises and to receive a diploma. Instead he was given a certificate of graduation and accompanying transcript which are the only officially recognized documents or records evidencing graduation.

The judgment is affirmed. See Freeman v. Flake, 10 Cir., —— F.2d ——.

Opinion of the United States District Court for the District of Utah in *Freeman et al.* v. *Flake, et al.*

UNITED STATES DISTRICT COURT

D. UTAH, N. D.

OCT. 2, 1970

Nos. NC 36-70, 37-70 and 249-70

BILLIE K. FREEMAN, Guardian of Terry Freeman,

Plaintiff,

v.

ALMON FLAKE, Principal of Viewmont High School, the BOARD OF EDUCATION OF DAVIS COUNTY SCHOOL DISTRICT, and IRVIN R. CLEVERLY, MORRIS HANSEN, HENRY E. PETERSON, LYNN W. BURTON, and HAROLD J. GAILEY, members of the Board of Education of Davis County School District, and BERNELL WRIGLEY, Superintendent of Davis County Schools,

Defendants.

VYRON RANDALL OSTLER, a minor, by Stephen B. Ostler, his father and natural guardian,

Plaintiff,

v.

BERNARD YOCOM, LAWRENCE L. COOK, LYNN WILCOX, and the BOARD OF EDUCATION OF DAVIS COUNTY SCHOOL DISTRICT,

Defendants.

MARK CHARLES SIMMONS, by and through his guardian Robert C. Simmons,

Plaintiff,

v.

CLIFTON PYNE, Principal of Orem High School, and the BOARD OF EDUCATION OF ALPINE SCHOOL DISTRICT, and DR. BOYD J. LARSEN, FRANK C. GREENWOOD, ELI C. CLAYSON, DR. R. PHIL SHUMWAY, HARVEY E. SMITH, members of the Board of Education of Alpine School District,

Defendants.

JAMES N. BARBER and RICHARD M. DAY, Salt Lake City, Utah, *for Terry Freeman and Mark Charles Simmons.*

FRANK S. WARNER, Ogden, Utah, *for Vyron Randall Ostler.*

FELSHAW KING, Clearfield, Utah, *for Almon Flake and others and Bernard Yocom and others.*

HARVARD R. HINTON, Lehi, Utah, *for Clifton Pyne and others.*

CHRISTENSEN, *District Judge.*

The above-entitled cases, consolidated fo ial because they involve common questions of fact and law, present questions concerning the power of school boards in the State of Utah, and school officials acting under them, to promulgate and enforce regulations dealing with the length of hair of students and related matters of appearance and grooming.

In No. NC 36-70, Freeman v. Flake, plaintiff, represented by his mother as guardian, is a student in Viewmont High School, one of the schools maintained and administered by Davis County School District, State of Utah. It is alleged that on or about September 17, 1970, the defendant Principal suspended or expelled this student preventing him from attending further classes, all without justification, legal excuse or opportunity for hearing, but because of the refusal of Terry Freeman to comply with the defendants' orders or regulations relating to the length or style of students' hair.

In NC 37-70, Ostler v. Yocom, the plaintiff was enrolled as a student in Sunset Junior High School, one of the junior high schools maintained and administered by the Board of Education of Davis County School District. It is alleged that on or about September 16, 1970, the defendant Yocom requested the vice-principal and the principal of this school to suspend or expel the plaintiff; and that the defendants have subsequently prevented plaintiff from entering or attending any classes at the Sunset Junior High School because of the plaintiff's refusal to comply with the defendants' orders or regulations relating to the length or style of hair.

In No. C 249-70, Simmons v. Pyne, similar allegations are made on behalf of Simmons.

The evidence shows that the students were suspended because of their refusal to comply with the regulations as to length of hair, that while Freeman was performing marginally otherwise, the suspension could not be justified on other grounds. Simmons and only to a lesser extent Ostler were considered good students aside from the problem involved here. The hair of all three was persistently maintained in a manner to clearly violate the requirements

in question and abundant opportunity was afforded each to bring himself into compliance before the suspensions. Freeman and Ostler have the opportunity of keeping up their school work through home teachers provided by the defendants during their periods of suspension. Simmons has now had his hair cut sufficiently to bring him into compliance with the regulation and is in school without abandoning his contention that his future conduct will be unconstitutionally restricted unless the regulation is declared invalid. I do not think that the case is moot for this reason. Ostler is the only one who gave any reason other than general ones for his resistance to the rules, claiming that long hair was necessary to cover a scar on his head. Personal inspection is convincing that the scar is covered equally well by length within the regulation. There is nothing in the evidence to suggest that this was his real reason for non-compliance or that if it was the school authorities would not permit any reasonable departure in view thereof.

Jurisdiction in each case here is claimed on the basis of 28 U.S.C. § 1343, 42 U.S.C. §§ 1983 and 1985, upon amendments I, IV, IX and XIV of the Constitution of the United States, and upon 28 U.S.C. §§ 2201, 2202. This court does have jurisdiction over the subject matter of the actions and the persons of the parties.

In the first two cases venue is appropriately laid in the Northern Division of the District of Utah; and upon consolidation the third case was transferred, with the consent of the parties and pursuant to the rule of court, for disposition in the Northern Division in connection with the prior cases.

The cases initially came before the court on applications for restraining orders and preliminary injunctions pen-

dente lite; but by reason of the urgency of an early determination, and in order to avoid duplication by separate hearings with reference to preliminary injunctive relief and upon the final merits, the parties have stipulated and the court has approved the hearing of the cases upon their final merits at this time, there having been a waiver of time for pleading and pre-trial discovery and a stipulation that except as indicated otherwise in the evidence the complaints in the cases may be deemed by the respective defendants.

Evidence has been taken over a period of three days; in addition pre-trial briefs and oral arguments of counsel have been considered. The court now considers itself fully advised and believes it essential in the public interest, for the welfare of the students directly involved and the student bodies of the schools generally to announce its decision without further delay.

Contending that each answer must be in the affirmative, the plaintiffs present the following questions for determination:

1. Whether requiring a student to conform to a regulation governing length or style of hair as a prerequisite to attending a public school violates his and his parents' fundamental rights of privacy guaranteed by the First Amendment and the "penumbra" of the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States.

2. Whether suspension or expulsion of a student from public school for wearing long hair denies him the freedom of expression guaranteed and protected by the First Amendment.

3. Whether suspension or expulsion of a student from public school for failure to comply with a regulation published or unpublished, governing the length or style of hair, violates the Due Process Clause of the Fourteenth Amendment.

4. Whether a regulation which prevents students from attending public schools solely because of the length of their hair is a violation of the Equal Protection Clause of the Fourteenth Amendment as an unreasonable classification.

5. Whether the regulation under which plaintiffs were suspended or expelled is unconstitutionally vague.

I have indulged a wide range of evidence in these cases to have assurance that no significant points are overlooked. The students involved and their witnesses, as well as the experts, have been permitted rather freely to express their opinions concerning the regulations in question, as well as general problems of student relationships and school administration.

With much of what has been said on behalf of each side, I can agree—the importance of individual liberty in schools as well as out, the requirement to observe constitutional limitations in school as well as out, the necessity of reasonable regulations to advance and to protect the learning process, the desirability of collaboration and mutual discussion in the formulation of school policies, the necessity or ultimate responsibility upon school administrators to administer and upon teachers to teach, the desirability that every student, without interference, receive in-school training with the maximum self-determination and liberty consistent with the functioning of a school, the learning process

and the rights of others, and the necessity that those defying reasonable regulations not be permitted to break down school administration in perversion of their own attitudes and the destruction of a system indispensable to the discharge of the mission of the schools.

There is much in the testimony with which I do not agree. I cannot accept the contention that all people wearing long hair are mentally ill on the one hand, or on the other that they are as a general rule more creative or scholarly than those who do not. I do not agree that the function of a school is necessarily to teach the philosophy of the majority of the patrons of school, much less the philosophy of a minority of the patrons or of those who have no connection with its problems. It is questionable that there is any inherent or necessary correlation between long hair and improper conduct. There is evidence indicating that long hair creates negative attitudes if not opposition from the majority of students, that those with long hair tend to isolate themselves from the main stream of student activity and that long hair in the climate of the time is disruptive within the schools in question of proper school discipline and the learning process to an extent.

The experts and the evidence in general are in substantial agreement that beyond whatever excessively long hair indicates about the personal attitude and mind of individuals it has become within the fabric of our society a symbol of dissatisfaction and protest to which a substantial number of people, for reasons sufficient to themselves, respond and with which young minds in the process of resistance to authority are likely to identify without any real ideological view except the testing of parental or school authority. There seems to be a correlation between long hair and improper grooming aside from hair.

There was a sharp difference of opinion as to the necessity or benefits of the regulations in question in these or other schools among the witnesses, but those directly connected with the schools and school districts in question were in substantial agreement that they were beneficial if not essential, and there is indication that they have the broad support not only of the patrons and administrators but of the students therein.

It should be noted that in what has been said hereinbefore and in the discussion which follows the term "long hair" generally is used to refer to hair of a junior or senior high school male student permitted to grow substantially beyond the limits referred to in the regulation in question. That is not to say that hair within the limits may not be considered "long", depending upon the viewpoint. And I am impressed with the statement of one of the witnesses that between close shaven hair and the limits of the regulation there is a considerable leeway for individual taste (including what may be regarded by many as long hair for male students). And I must emphasize that anything which has been or will be said about "long hair" in no way is intended as a moral or ideological judgment. We are not concerned with any point except the right of junior or high school students to wear long hair beyond and in defiance of school regulations, and we are not concerned necessarily with this question in the abstract but with reference to the specific regulations involved here and under the circumstances shown by the evidence.

While the applications vary somewhat among the cases, the regulation of the Davis County School Board on the subject in question is characteristic and raises all of the issues with which we are concerned in these cases:

"The Board of Education of the Davis County School District, in support of the aims of public education, recognizes that standards of proper dress and grooming seriously affect the behavior of students attending school. Experience has demonstrated that the atmosphere for a good learning situation and a wholesome academic environment is improved when proper dress, proper grooming and when proper standards of decorum and discipline are adhered to by the studentbody. The Board of Education, therefore, strongly urges that every effort be made to promote and maintain such personal maturity and development.

"As a student seeks purposely to draw attention to himself through oddities of dress and styles, he is usually displaying a false sense of values and will, quite likely, not fulfill himself academically in his school and his studies. Furthermore, experience indicates that there are sanitation and safety factors directly related to proper dress and grooming. Furthermore, experience indicates there is a real and reasonable connection between proper dress and grooming and the successful operation of the educational system with the maintenance of school discipline. Therefore, the Board of Education of the Davis County School District sets the following standards for school dress and appearance:

"1. All students shall maintain their hair in a clean and well-washed manner and male students shall comb and wear their hair so that it does not hang below the collar line in the back nor hang over the ears on the side and their hair must be above the eyebrows in the front. Male students shall be clean shaven and

their sideburns shall not be lower than the bottom of the ear and mustaches properly trimmed.

"2. All students shall be required to wear clean clothing and no immodest form or manner of dress shall be allowed. Shorts and other similar attire shall not be worn nor shall any clothing be worn which displays obscene or suggestive words or pictures nor shall any clothing be worn which is so extreme or odd that it may disrupt or tend to disrupt or interfere with school functions. School officials may require students to wear certain types of clothing for health or safety reasons in connection with certain specialized activities.

"If a student does not comply with these regulations upon direction of the principal, he may be suspended from school until such time as he does comply. Any student so suspended shall in any event be required to bring his parents or guardian to school for a conference with the principal before reinstatement at which time the principal may decide to reinstate the student or to continue the suspension.

"In the event the principal decides to continue the suspension after having met with the parents or guardian, the student, through his parents or guardian, shall have a right to appeal the decision of the principal to the Director of Pupil Personnel of the Davis County School District within Ten (10) days after the decision of the principal. The Director shall thereafter set a time for conducting a conference at which time the student, parents or guardian shall be given a hearing. At the conclusion of such informal hearing the Director shall either affirm the decision of the school principal or order the student reinstated.

"If the Director affirms the decision of the school principal, the student, through his parents or guardian, may appeal in writing to the Superintendent of Schools within Ten (10) days from the date of such decision. The Superintendent of Schools as the Executive Officer of the Board of Education shall thereafter review the decision of the Director of Pupil Personnel, with or without holding a hearing, and thereafter render a decision affirming the decision of the Director or ordering the student reinstated.

"At all times during the aforementioned appeal procedures, the student shall remain on suspension unless otherwise ordered by the Superintendent of Schools."

The Alpine School District Regulation is substantially the same with reference to length of hair, although varying in other respects. They were put in their present form shortly before the suspensions in question, but their content and substance have been in force and well understood over a substantial period of time theretofore.

There is no question of the statutory and inherent right of school boards within the State of Utah to promulgate and appropriately enforce reasonable regulations concerning the conduct, deportment, and grooming of students attending public schools placed under their administrative control, providing that such regulations do not offend rights guaranteed by the Constitution of the United States. Starkey v. Board of Education of Davis County School District, 14 Utah 2d 227, 381 P.2d 718 (1963); Beard v. Board of Education, 81 Utah 51, 16 P.2d 900 (1932); Davis v. Ogden City, 117 Utah 315, 215 P.2d 616 (1950); State v. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (1959).

The point has been advanced, more by way of suggestion in the pleadings or in inferential argument rather than solidly set out, that some problem of procedural due process is involved. The evidence and the final statement of plaintiffs' counsel have set such point at rest, for it now seems clear that the students involved were well aware of the regulations, had been repeatedly admonished in view of them, had, with the knowledge and acquiescence, if not support, of their parents elected to defy them and had rejected the known and established system of review through higher administrative authority. I do not believe that failure to exhaust administrative remedies would bar relief here under the civil rights acts but I am also of the opinion, confirmed by the statements of counsel, that procedural due process is not in issue.

Whatever uncertainty might exist concerning the term "proper grooming" in other respects, this is not involved in the present cases; because the school authorities acted upon the express requirements of length of hair, the validity of the regulations with respect thereto is the only point here.

I must reject the argument advanced by counsel for one of the plaintiffs that the regulation is uncertain or overly broad. General reference to "proper grooming" is not in question now. Indeed, the regulation as to hair is explicit, and if there were any way to draw lines, the lines have been rather specifically drawn in language that no student could misunderstand. And if a line is permissible someplace, it seems that the line drawn of not below the collar, not over the eyes, or not over the ears, is as manageable and reasonable as any other having practical significance. Thus, I hold that the regulation is not void on its face for

uncertainty or overbreadth and that we must look further into its nature and effect in order to determine its constitutionality.

Nor need we pause long at the contention that length of hair beyond the regulation is in itself a form of symbolic speech which with especial sensitivity beyond ordinary respect for constitutional limitations must be protected under the First Amendment. It is argued that such conduct, like words, can be an expression or dramatization of a moral, sociological, political, religious or ideological viewpoint. However the argument may be sustained in another context, more is required here than counsel's suggestion that the plaintiffs perhaps were indicating a profound or hidden ideological view unknown even to themselves and thus that the right of symbolic free speech might be involved. The main reason assigned by the plaintiffs for resistance to the regulation was that they "wanted" to have longer hair, they "liked" it and they thought it was their "right".

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), does not suggest that this is "symbolic, free speech". On the contrary, this case states, among other things:

> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. Cf. Ferrell v. Dallas Independent School District, 392 F.2d 697 ([5th Cir.] 1968); Pugsly v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"

And in United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968), the Supreme Court said:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

As noted by Judge Doyle in Brick v. Board of Education, Sch. Dist. No. 1, Denver, Colo., 305 F.Supp. 1316, (D. Colo. 1969):

> "This does not mean though that conduct of the kind here in question does not have any constitutional protection. It is protected to the extent that the due process clause of the Fourteenth Amendment prohibits the arbitrary deprivation of liberty. This right is, however, both substantively and procedurally distinct from the paramount right to freedom of speech . . . Legislative power in this area is circumscribed to a much greater degree than in the area of conduct, and courts require that the state come forward with the evidence that such a regulation is necessitated by a compelling state interest before its constitutionality will be sustained . . . On the other hand, the role of a federal court in reviewing claims that state regulations of liberty violate substantive due process is relatively narrow."

In Tinker v. Des Moines Sch. Dist., *supra*, neither the trial court nor the Supreme Court reached the question whether even in the sensitive free speech area a regulation was justifiable in circumstances similar to the present ones before the court.

If we are to extrapolate a result from *Tinker* and the cases dealing more precisely with conduct as distinguished from speech, in the context of the evidence before this court, it would be that school board action reasonably designed to foster legitimate educational aims and to promote the learning process, order or safety of students will be sustained if not arbitrary or capricious. The state in the area of regulation of grooming and in connection with its broader but related functions is advancing a vital state interest. Those activities which have a disruptive effect on the learning atmosphere in public schools are not improper subjects for regulation.

The evidence in my opinion clearly shows that not only were the regulations with regard to hair length adopted after careful consideration and in the intended best interest of the educational process, but they were based upon reasonable findings supported by the evidence tending to indicate to the reasonable mind that such regulations would minimize disruption and distraction in the school, promote order and safety, redirect the attention of students from an obsession with, or reaction against, mere hair length—as an achievement or a counter-achievement—would direct attention to more productive activities, and would minimize the danger of distraction from educational pursuits. Others considering such evidence might come to a different conclusion but this does not destroy the underpinnings of the boards' determinations, since those boards, rather than others, are charged with the legal responsibility of adopting regulations consistent with constitutional limitations and the dictates of reason. I reject any broad notion that within those limitations federal judges are established as over-

seers to regulate the exercise of state discretion as well as to see that constitutional limitations are not breached.

Under circumstances having some relationship to the present cases, many courts have sustained similar regulations. Leonard v. School Committee, 349 Mass. 704, 212 N.E.2d 468, 14 A.L.R.3d 1192; Davis v. Firment, 269 F.Supp. 524, (D.C.La.), affd., 408 F.2d 1085 (5th Cir. 1967); Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968); Akin v. Board of Education of Riverside Unified School District, 262 Cal.App.2d 161, 68 Cal.Rptr. 557 (1968); Brick v. Board of Education, Sch. Dist. No. 1, Denver, Colorado, 305 F.Supp. 1316 (D.C. Colo.1969); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970); Stevenson v. Wheeler County Board of Education, 426 F.2d 1154 (5th Cir. 1970); Neuhaus v. Torrey, 310 F.Supp. 192 (D.C.Cal.1970); Farrell v. Smith, 310 F.Supp. 732 (D.C.Maine 1970); Crews v. Clones, 303 F.Supp. 1370 (D.C.Ind.1969); Pritchard v. Spring Branch Independent School District, 308 F.Supp. 570 (D.C.Tex.1970); Wood v. Alamo Heights Independent School District, 308 F.Supp. 551 (D.C.Tex.1970); Christmas v. El Reno Board of Education, 313 F.Supp. 618 (D.C.Okl.1970). Other courts have reached contrary conclusions on facts which bear some similarity to the present cases. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937, 90 S.Ct. 1836, 26 L.Ed.2d 268 (1970); Westley v. Rossi, 305 F.Supp. 706 (D.C.Minn.1969); Griffin v. Tatum, 300 F.Supp. 60 (D.C. Ala.1969), affd. in part, 425 F.2d 201 (5th Cir. 1970); Olff v. East Side Union High School District, 305 F.Supp. 557 (D.C.Cal.1969); Richards v. Thurston, 304 F.Supp. 449 (D.C.Mass.1969), affd., 424 F.2d 1281 (1st Cir. 1970); Calbillo v. San Jacinto Junior College, 305 F.Supp. 857 (D.C. Texas 1969); Lucia v. Duggan, 303 F.Supp. 112 (D.C.Mass.

1969); Finot v. Pasadena City Board of Education, 250 Cal.App.2d 189, 58 Cal.Rptr. 520 (1967). Counsel have not reported nor have I been able to find that either the United States Court of Appeals for the Tenth Circuit or the Supreme Court has yet ruled upon a case closely in point.

I am of the opinion that the line of authority first cited represents the best if not the majority view on the question.

I shall not attempt here to re-examine beyond what I have said the detail of reason going into the cited cases, I conclude in view of my evaluation of those reasons, the evidence before the court, and the controlling principles of law, that the enforcement of the regulations by suspension pending compliance in the context of these cases does not violate either the students' or the parents' fundamental rights of privacy, does not deny freedom of expression guaranteed and protected by the First Amendment, does not violate either procedural or substantive due process or the equal protection clause of the Fourteenth Amendment, that the regulations are not unconstitutionally vague, or overly broad, and that there is no basis for enjoining their application and enforcement in the schools involved here under existing circumstances.

Wherefore, this opinion being deemed sufficient as findings of fact and conclusions of law, pursuant to the requirements of Rule 52, F.R.Civ.P., it is now ordered that injunctive relief should be, and it is hereby, denied, and the actions of the plaintiffs dismissed, without costs.

Opinion of the United States District Court for the District of New Mexico in *White* v. *Board of Education of Hobbs Municipal School District*

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

No. 8485 Civil

AL WHITE, a minor by his father, V. T. WHITE,

Plaintiff,

vs.

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT No. 16; HARRY MCADAMS, HERB KING, EDWARD BURKE, DALE COOPER, and D. A. COCHRAN, individually and as members of the said Board; R. N. TYDINGS, individually and as Superintendent of the said District No. 16; VIRGIL L. WELCH, individually and as Principal of Hobbs High School,

Defendants.

DECISION OF THE COURT

I would like to express my appreciation to counsel for a very excellent and able presentation on both sides of the case, for obviously coming well prepared and for having considered the many cases that have been decided in this field. The issue is one of significance and of societal importance. It is perhaps a microcosm of the ever present conflict between the status quo and change.

There has been enough literature written on the field that I find no necessity to write Findings of Fact and

Conclusions of Law or an Opinion. The remarks which I now make will constitute the Findings of Fact and Conclusions of Law of the Court.

As I say, there have been many cases in this field and on this subject, and the one pervading rule that comes from all of them is that each case is to be decided on its own facts. So far as I am concerned, the issues in this case are limited solely:

(1) To a determination of whether the School Board of Hobbs has borne its burden of justifying a regulation limiting the length at which male students in Hobbs High School may wear their hair.

I want it explicitly understood, we are not talking about a code, in so far as it relates to dress or any other regulation, other than one limiting the length at which male students may wear their hair.

(2) The further issue is whether the rule, as promulgated at Hobbs, is too vague to sufficiently apprize the plaintiff of what hair length was proscribed.

I recognize certain principles and am fully cognizant of them. Numbers of them have been written in the cases which have been decided on the subject, and I take the liberty of adopting and quoting from some of those cases, because they say very well the guiding principles, and I don't need to restate them.

Judicial interposition in the operation of the public school system of the nation raises problems which require great care and restraint. By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems, and which do not directly and sharply

implicate basic constitutional values. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1968).

However, in our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the states must respect, just as they, themselves, must respect their obligations to the state. *Tinker* v. *Des Moines Independent Community School District*, *supra* at 511.

It must be and is recognized, however, that school authorities are entitled to make and enforce reasonable regulations for maintaining an effective school system, and the Courts should refrain from interference with the functions of the school authorities, unless their action is arbitrary and unjustified so as to constitute a significant encroachment upon a personal liberty.

This Court accepts and adopts the view that the right to wear one's hair at any length is an aspect of personal liberty protected by the United States Constitution. *Richards* v. *Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969).

In order for the State, through its school officials, to sustain a regulation impairing a fundamental freedom, such as that here involved, the State's subordinating interest in the regulation must be compelling. Such a regulation bears a "substantial burden of justification," *Griswold* v. *Connecticut*, 381 U.S. 479, at 505 (1965), and each case and each regulation stands squarely on the facts of that case.

It is therefore necessary to determine from the evidence which has been presented in this Court whether the defendants have met their substantial burden of justifying this regulation which invades a constitutionally protected right of the plaintiff.

There is a second issue involved and that is the question of whether, if the rule is justified, it is sufficiently unambiguous to apprize those to be governed by it of what they must do to comply.

I'll tell you my decision in a nutshell. It is that the Court has concluded that the defendant school board has not borne its burden of justifying the challenged rule, and the rule is therefore violative of the Constitution of the United States and is not a justified exception thereto.

From the evidence in this case, it has been argued that there would be a breakdown in the learning process, disruptions and distractions, a breakdown in discipline and in student attendance if there were an absence of any rule governing the length of male hair.

It has also been argued that long hair presents problems, particularly of safety, in the field of vocational courses.

Now, the reported cases which have considered this problem have a great deal of such evidence in them, and in many of the cases rules limiting the length at which male students may wear their hair have been upheld on such allegations and such grounds.

However, a review of these cases persuades the Court that no evidence was introduced in any of them which is similar to the evidence which has been introduced in this case. There was no evidence in those cases to overcome that advanced by the school authorities in support of their position. This case is entirely different.

Evidence has been presented in behalf of the defendants from school administrators and teachers in schools which have in force some kind of hair regulation. They have expressed apprehensions and concerns as to what might result from the elimination of a regulation governing the length of male hair.

The Court recognizes that these administrators and teachers are conscientious and concerned educators, and it certainly respects their views and opinions. However, the defendants have presented no evidence from schools which have eliminated such a requirement to show that the absence of such a rule would result in increased discipline problems or other problems. What evidence they have presented, primarily from the Hobbs High School, as well as their other evidence, shows that there are disruptions, distractions and some problems within their existing rules. There has been absolutely no evidence to show what would happen for the worse without any rule or with the elimination of their rules.

On the contrary, the plaintiffs have offered evidence from administrators and teachers in schools which do not have such a rule to show that its absence has not created discipline, absenteeism or other problems.

Indeed, the plaintiff's evidence shows that experience, as opposed to what the Supreme Court has called, and to which Mr. Phillips referred, "vague, undifferentiated fears" of what might happen without such a rule, has proven that the absence of such a rule has had no adverse effect on the educational process. On the contrary, the plaintiff's evidence indicates that its absence actually reduces tension and enhances the learning process.

The evidence in the case shows that in the Albuquerque Public Schools the majority have abandoned such a rule.

I have forgotten the exact number, but, if my memory serves me right, we had direct testimony from teachers or administrators at three different Albuquerque High Schools which have no such rule, and the evidence from each of those persons was that the absence of such a rule created no problems and indeed operated to enhance the learning process.

Apparently numbers of other schools throughout the state have abandoned, for example, the school in Carlsbad, a rule on the length of male hair with no adverse effect to the educational system from the evidence brought out here.

Further, as to the evidence on vocational education and the adverse effects resulting from the elimination of a hair length rule, the experience of the largest vocational institution in the state, which has no such rule, is that the absence of it does not create any problems in that school which it has not been able to manage. The evidence indicates that there is no breakdown in discipline or other adverse effects, either on the individual, the student body as a whole, the administrators or the faculty.

Neither the circumstances of location, distance, opposition of the population or any other factor that has been introduced here shows that Hobbs is sufficiently different from Carlsbad or Albuquerque or anywhere else in the State to justify the necessity for such a rule.

It is difficult for the Court to comprehend how there can be a justification and a necessity for such a rule in Hobbs and not in Carlsbad, or in Manzano and not in Sandia High School.

There is a conflict in the evidence of expert opinions as to whether the absence of such a rule would cause problems and adversely affect the students or the educational

process. Insofar as there is a conflict in the evidence, I resolve that conflict in favor of the plaintiff.

As Mr. Phillips, I believe, or Mr. McKinnon pointed out, you have witnesses who are conscientious and competent testifying both for the plaintiffs and for the defendants. The only difference is that plaintiff's witnesses come with experience in exactly the problem here, and they advise the Court that they find that it does not create problems to not have such a rule. I believe them, and I accept their testimony.

Now, in making the decision which the Court does here today, it certainly is not expressing approval of lengthy male hair. From an aesthetic point of view, the Court finds very little, if not nothing, to justify it. However, considerations of the aesthetic viewpoint of the Court aside, there has been no showing to justify the invasion by this rule of the Constitutional right of this plaintiff.

Even if one might consider the question of the aesthetic viewpoint of the community or the school, evidence has not been sufficient on that to convince the Court that such considerations justify the constitutional invasion which the rule requires.

Therefore, it is the conclusion of the Court that judgment should be entered in favor of the plaintiff.

I might say on the second point to which I said I would address myself, that of whether the rule is so vague as to be constitutionally infirm, I have grave doubts whether the rule is sufficiently specific to meet constitutional standards. The rule as set out in the Handbook I think merely says "neat" and that apparently depends on how the administrator means that from year to year. His determination as to length has varied at times.

I don't know that that meets constitutional requirements, but I don't need to get to that point.

As I say, the Court will enter judgment in favor of the plaintiff and award costs to the plaintiff and hold that the rule or regulation is violative of the Constitution of the United States, is not justified, and that therefore, any reference in the school records of plaintiff to having been suspended for violation of the rule will be expunged.

HOWARD J. BRATTON
United States District Judge

Opinion of the United States District Court for the District of Colorado in *Cranson* v. *East Otero School District R-1, et al.*

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. C-2550

GREGORY A. CRANSON and RANDALL J. CRANSON, Minors by and through their Natural Guardian WALTER N. CRANSON,

Plaintiffs,

vs.

EAST OTERO SCHOOL DISTRICT R-1; JACK L. REED, Individually and as District Superintendent; GUY D. CALONGE, HENRY HOLMS, CLARENCE YERGERT, CALVIN CRANSON, and JOHN GRAVES, Individually and as Members of the School Board; MARVIN MARSH, Individually and as Principal of La Junta High School, La Junta, Colorado,

Defendants.

Messrs. Tom Holland and Charles E. Butler, Attorneys at Law, Colorado Rural Legal Services, Inc., 12 East 4th Street, La Junta, Colorado 81050, and Mr. Guy T. Saperstein, Attorney at Law, 970 Aurora Avenue, Post Office Box 1367, Boulder, Colorado 80302, for Plaintiffs; Mr. Ralph N. Wadleigh, Attorney at Law, Colorado Bank &

Trust Building, La Junta, Colorado 81050, and Henry, Cockrell, Quinn & Creighton, by Messrs. Benjamin L. Craig and Peter M. Eggleston, Attorneys at Law, 1415 Security Life Building, Denver, Colorado 80202, for Defendants.

MEMORANDUM OPINION AND ORDER

DOYLE, *Judge*

The plaintiffs have filed an action in which they seek an injunction, temporary and permanent, compelling the East Otero School District to admit them to high school. They seek a holding that the regulation of La Junta High School pertaining to hair length of students is unconstitutional and void as applied to them. One of the plaintiffs is a high school sophomore and the other is a junior.

The suit has been brought as a civil rights action, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Heretofore, on October 13, 1970, we denied a motion for a temporary restraining order pending the hearing of the case on its merits. The trial was had on October 21, 1970, and the matter now stands submitted.

The evidence establishes that the length of the hair did not create disturbances or disruptions, and, furthermore, that the plaintiffs were and are good students whose individual behavior and attitudes are not affected by hair length. Furthermore, the evidence establishes that the classmates of the plaintiffs are not opposed to their hair length. Indeed, 200 student signatures of a total of 800 plus were obtained on a petition which was presented to school authorities requesting that the plaintiffs be readmitted to school.

On the other hand, cogent evidence has been presented by the school authorities which establishes good reason for

the adoption of this regulation in La Junta, a rural community.

It appears from the evidence that in 1968 there was adopted a regulation which did not restrict the length of hair. It declared:

> Hair should not fall in front of the eyes. Almost any style or length is acceptable as long as it is neat and well groomed. Attitude might be the only factor when a style is rejected by the administration.

The testimony was to the effect that following the adoption of this it was discovered that the rule was too liberal and too vague and did not lend itself to any regulation whatever. The evidence also establishes that decorum and discipline suffered from the resultant hair lengths. One teacher testified that individual students developed attitudes of defiance and rebellion within the classroom which produced morale problems among members of the faculty. After that, on December 12, 1969, a new regulation was adopted which prohibited the wearing of hair over the eyes, ears, or over the collar. This regulation added "We will still accept most styles just *be reasonable.*"

We had this same question before us previously in *Brick* v. *Board of Education, School District No. 1, Denver, Colorado,* 305 F. Supp. 1316 (1969). In upholding the South High School regulation in that case we concluded that the regulation there involved was not contrary to the First Amendment in that the hair length was not shown to be an expression of viewpoint. This holding was in line with the decision of the Supreme Court in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), which case had to do with the wearing of black armbands by grade school stu-

dents for the purpose of expressing their opposition to war. The Supreme Court in holding that this was a constitutionally protected right distinguished such things as regulation of dress and hair style or deportment. The Court cited with approval *Ferrell* v. *Dallas Independent School Dist.*, 392 F.2d 697 (5th Cir.), cert. denied, 393 U.S. 856, 89 S.Ct. 98 (1968).

Plaintiffs maintain that quite apart from alleged violation of the First Amendment as incorporated in the Fourteenth Amendment, that their rights under the Fourteenth Amendment have been violated because of the irrational and arbitrary action of the School Board in promulgating the regulation in question. However, we conclude that the action of the school authorities in this instance was neither arbitrary nor unreasonable. It is true that the evidence did not establish that there existed disruption raucous in nature. On the other hand, as in *Brick,* it was shown that there was interference with the educational process. In this connection it is to be noted that the classroom is a sensitive atmosphere. In order for the teacher to effectively teach it is necessary that he have attitudes and responses which are conducive to presentation in accordance with full utilization of the teacher's talents and an atmosphere free of extraneous distractions. Evidence showing a breakdown of discipline and student attitudes of defiance are in our view disruption. Similarly, there was evidence that the length of hair hampers the physical education athletic programs.

In our opinion the evidence on behalf of the school authorities sufficiently established that there existed a rational basis for the adoption of the regulation which is here in question and, consequently, the interests of the school as a whole in the regulation outweighs any rights of the student to enjoy complete freedom.

For the above stated reasons we conclude that the constitutional rights of the plaintiffs are not violated and that they are not entitled to the relief sought. Accordingly, the request for an injunction is denied, and the complaint and cause of action are dismissed.

DATED at Denver, Colorado, this 22d day of October, A.D. 1970.

By the Court:

WILLIAM E. DOYLE, *Judge*
United States District Court

Opinion of the United States District Court for the Western District of Oklahoma in *Christmas* v. *The El Reno Board of Education*

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-70-263

GARY CHRISTMAS, A Minor, by his Father and Next Friend, WILLIAM R. CHRISTMAS,

Plaintiffs,

vs.

THE EL RENO BOARD OF EDUCATION, INDEPENDENT SCHOOL, DISTRICT No. 34; LESLIE F. ROBLYER, as Superintendent of El Reno Public Schools; and JERRY HUTCHISON, as Principal of El Reno High School,

Defendants.

PRELIMINARY STATEMENT

The complaint in this case was filed on May 21, 1970 and the attorneys for the defendants accepted service of the complaint and entered their appearance on the same day.

The parties, through their counsel, appeared before the court on May 21, 1970, upon plaintiffs' request for a Temporary Restraining Order. Defendants orally moved to dismiss the case for want of jurisdiction and further urged the court to obstain from exercising jurisdiction on

the grounds that there was no claim or showing that speedy and adequate relief could not be afforded in the state courts. Both issues raised were overruled and the court set the matter for trial on all issues at 10:00 a.m., May 22, 1970, with the agreement of all parties.

The complaint alleged plaintiff was being unlawfully prohibited by acts of the defendants, in their official capacities, from participating in a high school commencement ceremony and the receipt of a "diploma" at said ceremony. The ceremony was scheduled for Sunday, May 24, 1970 at 2:00 p.m.

The complaint requested injunctive and declaratory relief on claims of violation of the first, fourth, fifth, eighth, ninth, tenth, and fourteenth amendments to the Constitution of The United States and jurisdiction was invoked under 28 USC 1343, 2201, 2202, and 42 USC 1981, 1983, and 1975.

Plaintiff alleged his civil and constitutional rights would be violated to his irreparable injury if defendants were permitted to continue to enforce regulations concerning the dress and grooming required for participation in the scheduled ceremony. More specifically, plaintiff complained of the application to him of the regulation that the hair of male students shall not cover their ears, eyes or collar.

At the commencement of the trial on May 22, 1970, defendants renewed their jurisdictional objections which the court took under advisement, and the trial proceeded on its merits. The plaintiff introduced his evidence and rested and the defendants again renewed their jurisdictional objections and alternatively moved to dismiss the action upon the grounds that the evidence failed to present any

claim upon which relief could be granted. The court took these motions under advisement.

Thereupon the defendants presented their evidence and both parties rested.

Findings of Fact

1.

The plaintiff is an 18-year old white male student at El Reno High School, El Reno, Oklahoma, and has regularly attended classes since September, 1969 when he enrolled as a senior.

2.

The evidence is undisputed, as defendants' Exhibit "1" shows, that plaintiff was regularly graduated as of May 22, 1970, ranking 173rd in a class of 190, and was furnished a certificate of graduation and transcript in exactly the same form and bearing the same date as every other member of the graduating class.

3.

The certificate of graduation and accompanying transcript is the only officially recognized document or record evidencing that plaintiff or other students are graduates. It serves as the only permanent school record and certified copies are furnished to institutions of higher learning or to others on request.

4.

In the El Reno school system a diploma is an unofficial document presented in a post graduate ceremony afforded, on a student option basis, to those who have already

graduated. No records are made or kept as to either those students who attend the ceremony, or who receive diplomas at the ceremony. The ceremony is held on the Sunday following official graduation and is similar in many respects to post graduate baccalaureate ceremonies held by various churches in El Reno. Participation in either ceremony is purely by the voluntary choice of the graduates with those in charge of the ceremony establishing prerequisites for those desiring to participate.

5.

The El Reno School System has for a period of at least eight years maintained a consistent and uniform policy with regard to those students participating in commencement and public ceremonies or in other extracurricular activities. The administrative directive implemented on March 2, 1970 was the codification of a long standing policy of the El Reno School System. The constituent hair regulation of the Dress Code relating to public display, disruption, public performances and ceremonies has been in effect and uniformly enforced for eight years or more.

6.

Plaintiff's hair, when he presented himself for enrollment in the early part of September, 1969, was of such a length that it violated the regulation that the hair of male students must not cover the eyes, ears or collar if the student desired to participate in commencement and public ceremonies or other extracurricular activities. Plaintiff was advised of the regulation and specifically told at the time of his enrollment as a senior that he would be unable to participate in the post graduate commencement cere-

mony at which diplomas are received or other extracurricular activities and ceremonies unless his hair was cut to conform with the regulation. Plaintiff was again so advised in October, 1969; November, 1969; April, 1970; and in May, 1970 at times when he made inquiry or the subject came up in connection with other matters.

7.

Plaintiff's mother, who was present with her husband and son at the counsel table throughout the entire trial, was promptly told of the school's requirements of dress, attire and appearance for participation in the post graduate commencement ceremony in early September, 1969; late November, 1969; December, 1969; and again by a letter dated May 7, 1970, which was introduced in evidence by plaintiff. She was fully aware for almost eight months before this suit was filed that unless plaintiff's hair was cut above his eyes, ears and collar he would not be eligible to participate in the subject ceremony.

During the early part of December, 1969 plaintiff's mother went to the high school principal's office and requested the aid of the high school administrative staff to assist her in getting the plaintiff interested in extracurricular activities so that plaintiff would decide himself to get his hair cut. It was suggested that if plaintiff would present himself to the high school golf coach during the spring of 1970 he might be eligible to participate with the golf team if his grades improved; and in such a situation plaintiff would probably decide on his own to have his hair cut. Plaintiff never showed any inclination to or interest in participating in golf or any supervised extracurricular activities and ceremonies.

9.

About two weeks after plaintiff's mother had sought the help of the school administrative staff to arrange a situation or activity whereby plaintiff would decide on his own to have his hair cut, she called defendant Jerry Hutchison, the high school principal, and told him that she would see to it that plaintiff would have his hair cut prior to the commencement ceremony or "he would have to find some place else to live".

10.

On April 21, 1970 plaintiff who had not yet cut his hair came to defendant Hutchison's office and again asked the principal whether or not he would be able to participate in the post graduate commencement ceremony. Mr. Hutchison again, as he had often done over the preceding eight months, advised plaintiff that he would not unless he got his hair cut so that it would not cover his ears, eyes or collar. The plaintiff then requested a hearing before defendant Leslie Roblyer, superintendent of schools. The hearing was held on May 5, 1970, and after the hearing defendant Roblyer informed plaintiff that the principal's ruling was in accord with the policy and regulations of the El Reno Board of Education. On May 19, 1970, pursuant to the request of his attorneys, plaintiff, his mother, father and his attorneys appeared before the El Reno Board of Education appealing the decision of the principal and superintendent. After the hearing, on May 20, 1970, plaintiff's attorneys were advised that the school board had upheld the rulings of the superintendent and principal. This suit followed.

11.

Plaintiff admitted in his own testimony that he had had several fights both on and off the school premises, and acknowledged that his hair was a disruptive influence in the school system during the year. Other students had forceably attempted to cut plaintiff's hair. Plaintiff in his direct testimony admitted that his presence and participation in the scheduled ceremony would be a disruptive element and might cause trouble or a disturbance.

12.

After his enrollment in September of 1969, the plaintiff, in October of 1969, presented to the student council a resolution calling for student participation in a moratorium protesting the involvement of The United States in the Vietnam war. The student council rejected his proposal. Lafer in the same month, the plaintiff and a few other students appeared in the office of the high school principal protesting the school dress code, and presented a proposal for an "underground" student newspaper. He was advised by the high school principal that the dress code would continue unchanged and that if the plaintiff had an opinion for publication, he should present it to be published in the school newspaper, which is published weekly as a regular part of the El Reno Daily Tribune during the school year. The plaintiff and two other students wrote an article which was subsequently published in the school newspaper concerning The United States' involvement in Vietnam. Plaintiff admitted that he had never presented any article or publication for public presentment in the school paper which was turned down. The plaintiff and other students were also advised at the meeting in October

of 1969 that there would be a patriotic Veterans' Day assembly on November 11, 1969, and that if he or any other students objected to the assembly they should advise the school administration so arrangements could be made to have a supervised classroom for such students during the assembly. The plaintiff attended the assembly. On the day of the assembly and a few days prior thereto, the plaintiff wore a black arm band. The plaintiff admitted that he had never been refused the right at that time or thereafter to wear a black arm band. The evidence was undisputed that some students during the assembly turned their backs during the salute to the American flag and it was shortly after the assembly that the plaintiff was involved in several fights.

13.

It was uncontradicted that the principal and school administrators feared for plaintiff's safety, and the principal or vice principal at each change of classroom by plaintiff made themselves conspicuous by being near plaintiff in the school's hallways to prevent fights or disturbances involving plaintiff. Despite these precautions, in at least one instance, a fight in a hallway resulted in the presence of the principal which he was quickly able to stop. Plaintiff consistently refused to listen to suggestions by school counselors that his difficulties with other students might lessen if he cut his hair. Plaintiff testified he thought he had a "personal right" to wear his hair as long as he wanted.

14.

The defendants have been more than reasonable and fair with plaintiff in all respects. He has not been, al-

though the circumstances might warrant it, disciplined, punished or deprived of any right or educational opportunity. He has been permitted to attend and participate in all classes, to regularly graduate, and he has been awarded his certificate of graduation. As is shown by defendants' Exhibit "1", neither the certificate, nor the accompanying transcript, contain any notation or language indicating his conduct or grooming.

15.

The evidence in this case shows beyond any question that the defendants have more than justified the validity and reasonableness of regulations and their uniform enforcement, and accordingly defendants have met their substantial burden of justification. The plaintiff has not been deprived of any educational opportunities or his rights to express his opinions symbolically, orally or in writing.

16.

The hearings, appearances and consideration given plaintiff afforded all of the regular standard procedural and substantive due process rights to which he is entitled, and he has not been denied any basic or fundamental right.

17.

The School Board and its administrative staff have applied the regulations admitted into evidence with consistency and uniformity as the evidence clearly shows, and has not in any way or degree acted unreasonably, arbitrarily, capriciously or discriminatorily. The regulations themselves are reasonable and rational, and represent the expressed judgment of the duly constituted school board whose authority and duty to make such reasonable regula-

tions clearly appear. The School Board by its administrative staff has clearly demonstrated the need and necessity for rules and regulations of this type, and this court finds that in this case the regulation bears a substantial relation to the legitimate concerns of a public educational institution.

18.

The evidence clearly shows that the only obstacle between plaintiff and participation in the post graduate ceremony and receipt of a "diploma" is the length of his hair, and the defendants' testimony was that plaintiff could, if he chose to do so, participate in the scheduled ceremony, provided his hair was not over his eyes, ears or collar and he appeared at the ceremony dressed and groomed according to the other requirements of the ceremony.

19.

It should be noted that the case before the court does not involve any refusal to admit or enroll a student in a public school because of a school dress code. Nor does this case involve the suspension of a student from class attendance because of any school regulation. No educational rights are, or have been denied, and plaintiff having been regularly and formally graduated has been afforded all of the rights and privileges to which he is entitled.

Conclusions of Law

1.

While there is persuasive authority to the contrary, the court concludes it has jurisdiction over the parties and subject of this cause. *Ferrell* v. *Dallas Independent School*

District (5 Cir., 1968) 392 F.2d 697, cert. den. 393 U.S. 856, 89 S. Ct. 98. But see; *Schwartz* v. *Galveston Independent School District* (S.D. Tex. 1970) 309 F.Supp. 1034 and the exhaustive list of authorities cited therein.

2.

While the evidence of this case clearly shows that the defendants could have refused to enroll plaintiff, or have suspended him from attendance, this case involves only the clear and unquestioned right and responsibility of a School Board to promulgate and enforce rules and regulations consistent with the legitimate concerns of a public school system, subject only to constitutional review. *Ferrell* v. *Dallas Independent School District,* supra.

3.

Involving as it does, only the limited and narrow question of whether plaintiff has constitutional or other rights to attend an elective post graduate ceremony without complying with the reasonable dress and grooming requirements established for that and other extracurricular activities and ceremonies, this case is more nearly akin to cases where a student claims a right to play football or participate in a parade of a school band in violation of rules or without the proper band uniform and required grooming. *Estray* v. *LaFourche Parish* (La., 1969) 230 So.2d 443.

4.

The regulations under the evidence in this case, even if subject to the rule requiring a substantial burden of justification to sustain them, are reasonable, uniformly enforced, do not unlawfully or invidiously discriminate, and

the evidence shows valid and compelling reasons for their enactment and enforcement. Neither plaintiff's constitutional nor civil rights have been violated. *Ferrell* v. *Dallas Independent School District,* supra; *Crew* v. *Clones* (S.D. Ind. 1969) 303 F.Supp. 1370; *Snowden* v. *Hughes* (1944) 321 U.S. 1, 64 S. Ct. 397; *Byrd* v. *Sexton* (8 Cir., 1960) 277 F.2d 418; and *Leonard* v. *School Committee* (Mass. 1965) 212 NE2d 468, 14 ALR3d 1192.

5.

While waiver, laches or estoppel, or a combination of them appear to be a clear bar to any relief under the evidence in this case, the court having reached its decision on other grounds does not here pass upon their applicability at this time.

6.

Plaintiff, having shown no violation of any of his rights, is not entitled to declaratory or injunctive relief and judgment, together with costs, will be entered accordingly.

DONE and DATED this ..... day of June, 1970.

LUTHER BOHANON,
Chief District Judge

SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
FEB 17 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-956

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN; VERNON RANDALL OSTLER, a minor by STEPHEN OSTLER, his father and natural guardian; MARCK CHARLES SIMMONS, by and through his guardian ROBERT C. SIMMONS,

Petitioners,

—v.—

ALMON FLAKE, *et al.*,

Respondents.

AL WHITE, a minor by his father, Y. T. WHITE,

Petitioner,

—v.—

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, *et al.*,

Respondents.

GREGORY A. CRANSON and RANDALL J. CRANSON, minors, by and through their natural guardian, WALTER N. CRANSON,

Petitioners,

—v.—

EAST OTERO SCHOOL DISTRICT R-1, *et al.*,

Respondents.

GARY CHRISTMAS, a minor by his father and next friend, WILLIAM R. CHRISTMAS,

Petitioners,

—v.—

THE EL RENO BOARD OF EDUCATION, *et al.*,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS

PAUL A. PHILLIPS
520 Simms Building
Albuquerque, New Mexico 87101

DAN MCKINNON, III
608 First National Bank Building
Albuquerque, New Mexico 87101

STEPHEN F. WILLIAMS
Fleming Law 205
University of Colorado
Boulder, Colorado 80302

PHILIP F. HORNING
903 First National Bank Building
Oklahoma City, Oklahoma 73102

JAMES N. BARBER
716 Newhouse Building
Salt Lake City, Utah 84111

Of Counsel

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-956

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN; VERNON RANDALL OSTLER, a minor by STEPHEN OSTLER, his father and natural guardian; MARCK CHARLES SIMMONS, by and through his guardian ROBERT C. SIMMONS,

Petitioners,

—v.—

ALMON FLAKE, *et al.*,

Respondents.

AL WHITE, a minor by his father, V. T. WHITE,

Petitioner,

—v.—

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, *et al.*,

Respondents.

GREGORY A. CRANSON and RANDALL J. CRANSON, minors, by and through their natural guardian, WALTER N. CRANSON,

Petitioners,

—v.—

EAST OTERO SCHOOL DISTRICT R-1, *et al.*,

Respondents.

GARY CHRISTMAS, a minor by his father and next friend, WILLIAM R. CHRISTMAS,

Petitioners,

—v.—

THE EL RENO BOARD OF EDUCATION, *et al.*,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS

The petitioners are filing this supplemental brief to bring to the Court's attention a recent decision of the United States Court of Appeals for the Fourth Circuit in a case involving high school hair length regulations. *Joseph Edward Massie, Jr., et al.* v. *Stanley Henry, Chairman of Board of Education of Haywood County, N. C., et al.*, No. 15,325 (February 2, 1972). For the convenience of the Court, the Fourth Circuit opinion is set out below as an Appendix to this brief.

The opinion, which is the first decision of the Fourth Circuit on this issue, held that the right of students to wear their hair as they wish is protected by the due process and equal protection guarantees of the Fourteenth Amendment. The Court further held that the school authorities had failed to justify their infringement of those rights. The dissenting opinion, relying on the reasoning of the Tenth Circuit in the instant case, concluded that a conflict "over the length of a schoolboy's hair" does not directly and sharply implicate constitutional values.

The Fourth Circuit decision is further evidence of the conflicts among the Circuits which should be resolved by the Court.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010
Attorneys for Petitioners

PAUL A. PHILLIPS
520 Simms Building
Albuquerque, New Mexico 87101

DAN MCKINNON, III
608 First National Bank Building
Albuquerque, New Mexico 87101

STEPHEN F. WILLIAMS
Fleming Law 205
University of Colorado
Boulder, Colorado 80302

PHILIP F. HORNING
903 First National Bank Building
Oklahoma City, Oklahoma 73102

JAMES N. BARBER
716 Newhouse Building
Salt Lake City, Utah 84111
Of Counsel

February 1972

Opinion of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 15,325

JOSEPH EDWARD MASSIE, JR., DANNY EDWARD DAVIS, JAMES LEE FRANKLIN, and KEVIN MICHAEL RAY,

Appellants,

—versus—

STANLEY HENRY, Chairman of Board of Education of Haywood County, N. C., JOHN DOE, *et al.*, the Members thereof, of Haywood County, N. C., CARL RATCLIFF, Principal; and CHARLES (BILL) MILNER, Asst. Principal, of the Tuscola Senior High School, Waynesville, N. C.,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones, *Chief Judge.*

(Submitted on briefs May 4, 1971

Decided February 2, 1972.)

Before:

HAYNSWORTH, *Chief Judge,* and
BOREMAN and WINTER, *Circuit Judges.*

(GEORGE S. DALY, JR., on brief for Appellants and HALLETT S. WARD, JR., and MORGAN, WARD and BROWN, Attorneys, on brief for Appellees.)

WINTER, *Circuit Judge*:

The minor plaintiffs, male students at the Tuscola Senior High School, Haywood County, North Carolina, were suspended from school for their deliberate refusal to conform to a "guide line," recommended by a student-faculty-parent committee and adopted by the high school principal, regulating the length of hair and side burns. Plaintiffs wore their hair at a length extending below their collars and below and covering their ears; and at least two of the plaintiffs wore their side burns below their ear lobes, all in violation of the regulation. Their suit for declaratory and injunctive relief under 42 U.S.C.A. § 1983 followed. The district court, finding the regulation justified, and finding that none of plaintiffs' constitutional rights had been denied them, dismissed the action. We reverse.

—I—

The operative facts proved at the trial and found by the district court are as stated. Additionally, the district court found that establishment of the regulation had been requested by the President of the Student Body following an incident in which a student with long hair was called a "hippie" and a fight ensued.

There was also evidence before the district court that the length of plaintiffs' hair evoked considerable jest, disgust and amusement rendering the restoration and preservation of order in the classrooms difficult. Two "long hair" students reported that they had been threatened with being beaten up. One teacher said that plaintiffs had difficulty in writing on the blackboard because their hair fell into their eyes. A welding instructor stated that he would not

permit a student with long hair to take his course or even enter his classroom because of the danger of fire and injury from flying sparks and molten metal particles.

There was no claim that plaintiffs' hair was unhygienic. Indeed, plaintiffs testified that they washed it daily, and the district judge said that it appeared clean and well-groomed when plaintiffs were in court.

—II—

Whether the right of a male to wear long hair and to have long or fulsome side burns is a constitutionally protected right is a question which has given birth to a rash of recent litigation resulting in conflicting adjudications. And if the right is recognized as a constitutionally protected one, there is a similar lack of agreement as to its precise nature, that is, the chapter and verse of the Constitution which protects it. Unquestionably, the issue is current because there is abroad a trend for the male to dress himself more extravagantly both in the nature, cut and color of his clothing and the quantity and mode of his facial and tonsorial adornment. The shift in fashion has been more warmly embraced by the young, but even some of the members of this court, our male law clerks and counsel who appear before us have not been impervious to it. With respect to hair, this is no more than a harkening back to the fashion of earlier years. For example, many of the founding fathers, as well as General Grant and General Lee, wore their hair (either real or false) in a style comparable to that adopted by plaintiffs. Although there exists no depiction of Jesus Christ, either reputedly or historically accurate, He has always been shown with hair at least the length of that of plaintiffs.

If the validity and enforcement of the regulation in issue is sustained, it follows that none of these persons would have been permitted to attend Tuscola Senior High School.*

—III—

If we limit ourselves only to decisions of United States Courts of Appeals, we find that the Fifth Circuit, in *Ferrell* v. *Dallas Independent School District,* 392 F.2d 697 (5 Cir. 1968), *cert. den.,* 393 U.S. 856 (1968), upheld the validity and enforcement of a school regulation which excluded male students having a "Beatle type haircut" upon the mere showing that their presence in the schools might be disruptive. Circuit Judge Tuttle dissented, expressing the view that equal protection had been denied, and that the majority was overly prone to limit the exercise of constitutional rights because of the possibility that disorder, resistance or violence might ensue. Although *Ferrell* implicitly and explicitly assumed a constitutional right to select the length of one's hair, later Fifth Circuit decisions appear to proceed on the basis that the right to select the length of one's hair is too insubstantial to warrant federal court consideration. *Wood* v. *Alamo Heights Independent School District,* 433 F.2d 355 (5 Cir. 1970); *Stevenson* v.

* Substantially every president of the United States serving before the time of Woodrow Wilson would also have been in violation of this regulation. After Garfield, occupants of the White House had their hair cut somewhat shorter, but Arthur's mutton chop sideburns, Harrison's full beard and the mustaches of Cleveland, Roosevelt and Taft would have been in violation of the regulation. Before Wilson, only McKinley might have passed muster. Although presidents may have responded sooner to the trend to shorter hair, older men, within the memory of some of the judges of this court, were frequently seen with their hair long enough to have been in violation of this regulation.

Board of Ed. of Wheeler County, Georgia, 426 F.2d 1154 (5 Cir. 1970), *cert. den.,* 400 U.S. 957 (1970); *Griffin* v. *Tatum,* 425 F.2d 201 (5 Cir. 1970); *Davis* v. *Firment,* 408 F.2d 1085 (5 Cir. 1969).

The Sixth Circuit in *Jackson* v. *Dorrier,* 424 F.2d 213 (6 Cir. 1970), *cert. den.,* 400 U.S. 850 (1970), followed the Fifth Circuit's decision in *Ferrell.* The Sixth Circuit held, upon evidence that the wearing of excessively long hair caused classroom disruption and constituted a distraction from the educational process, that there was no violation of a First Amendment right (the evidence was that the "long hair" students adopted that style to further a musical group of which they were members), that there was no denial of substantive or procedural due process, that there was no denial of equal protection (the district court had found that the regulation banning long hair had a real and reasonable connection with successful operation of the educational system and the maintenance of discipline) and that there had been no violation of the right of privacy. Accordingly, it sustained enforcement of a regulation which was applied to prohibit the wearing of excessively long hair and suspension of students who violated it.

More recently, the Ninth Circuit has held that a suit by male students who objected to compliance with a school regulation limiting the length of their hair failed to establish "the existence of any substantial constitutional right . . . being infringed," *King* v. *Saddleback Junior College District,* 445 F.2d 932, 940 (9 Cir. 1971); and the Tenth Circuit has followed the lead of the Fifth Circuit in treating the problem as one too insubstantial to justify cognizance of it in the federal courts. *Freeman* v. *Flake,* 448 F.2d 258 (10 Cir. 1971).

In contrast, the First, Seventh and Eighth Circuits have found regulations limiting the length of hair invalid, at least in the absence of persuasive reason and persuasive proof to support their promulgation and enforcement. Their approach to these issues is quite different from that of the other circuits. See note, 84 Harv. L. Rev. 1702 (1971). See also, the opinion of Mr. Justice Douglas dissenting with regard to the denial of certiorari in *Olff* v. *East Side Union High School District*, —— U.S. ——, 40 U.S.L.W. 3332 (January 17, 1972). In *Breen* v. *Kahl*, 419 F.2d 1034 (7 Cir. 1969), *cert. den.*, 398 U.S. 937 (1970), it was held that the right to select the length of one's hair was a due process right, falling within the penumbras of the First Amendment or within the rights guaranteed by the Ninth Amendment, and one which could be limited only upon a showing of substantial countervailing state interests. In *Breen*, the regulation was invalidated and the expulsion and threatened expulsions were nullified. The court rejected the state justification that long hair *may* distract short haired students from their school work, that students whose appearance conforms to community standards perform better in school, and that, in any event, the power of a school board to discipline must be upheld.

Factually, *Breen* is distinguishable from the case at bar and the decision in *Ferrell*, but *Crews* v. *Cloncs*, 432 F.2d 1259 (7 Cir. 1970), which followed, is more in point. In *Crews*, a male student with long hair was denied readmission to high school because of the length of his hair. In holding that the student was entitled to an injunction to require his readmission, the court reiterated its holding in *Breen* that the right to select the length of one's hair was a personal freedom protected by the Constitution and then

considered whether the substantial burden of justification to limit the right had been shown. The court rejected, as sufficient grounds of justification, evidence that other students were distracted and preoccupied in observing the plaintiff, and evidence that short hair was required for health and safety reasons when engaging in athletics or laboratory work around Bunsen burners. As to the former, the court invoked the principle that it is absurd to punish a person because his neighbors lack self-control and cannot refrain from violence; and, as to the latter, the court concluded that the objectives of health and safety could be achieved by use of hair nets or other protective devices.

Richards v. *Thurston*, 424 F.2d 1281 (1 Cir. 1970), was decided on the sparse facts that the male student, whose hair fell loosely about his shoulders, was suspended from school because of an unwritten policy (treated as a regulation) prohibiting "unusually long hair." An injunction to require his reinstatement was affirmed, the court holding that the right to select the length and style of one's hair was a personal right of liberty protected by the due process clause and that that right could be limited only by an outweighing state interest justifying the intrusion. Because the record was so bare, the court had no occasion to discuss specific evidence, but it elaborated on the outweighing state interest by saying:

> Once the personal liberty is shown, the countervailing interest must either be self-evident or be affirmatively shown. We see no inherent reason why decency, decorum, or good conduct requires a boy to wear his hair short. Certainly eccentric hair styling is no longer a reliable signal of perverse behavior. We do

> not believe that mere unattractiveness in the eyes of some parents, teachers, or students, short of uncleanliness, can justify the proscription. Nor, finally, does such compelled conformity to conventional standards of appearance seem a justifiable part of the educational process.

Id., 424 F.2d at 1286.

Finally, *Bishop* v. *Colaw*, —— F.2d, —— (8 Cir., October 27, 1971), the latest expression on the subject, held invalid and unenforceable a dress regulation which, *inter alia*, required male students to wear their hair at a length shorter than their collar and above their ears. The Court considered thoroughly prior court of appeals, as well as district court, decisions on the subject. It rejected the claim that the plaintiff (Stephen) was deprived of any First Amendment right for lack of any "evidence suggesting that Stephen's hairstyle represented a symbolic expression of any kind," —— F.2d at ——; and while it noted the possibility of a claim of denial of equal protection (discrimination between males with differing hair lengths), it declined to pass on this issue. It also rejected the argument that the regulation violated Stephen's parents' rights because the record showed that they supported but did not select Stephen's hairstyle. It did hold, however, that Stephen had a due process right to govern his own personal appearance, declining in the process to choose a label as to whether the right was "fundamental," "substantial," "basic," or simply a "right," but that the right was not absolute and must yield when its exercise infringed upon the rights of others. The court then examined the purported justifications for the regulation, i.e.,

disruption in the classroom, sanitation problem in the swimming pool, safety problem in shop classes, and asserted correlation of long hair with poor grades; and, finding them insufficient to demonstrate the necessity for the regulation, invalidated it.

—IV—

We find *Breen, Crews, Richards* and *Bishop*, and their decisional approaches, more persuasive than *Ferrell* and its progeny, and we have concluded to follow the former.

Perhaps the length of one's hair may be symbolic speech which under some circumstances is entitled to the protection of the First Amendment. But the record before us does not establish that the minor plaintiffs selected the length of their hair for any reasons other than personal preference. For that reason, we prefer in this case to treat their right to wear their hair as they wish as an aspect of the right to be secure in one's person guaranteed by the due process clause, *Union Pacific Railway Co.* v. *Botsford*, 141 U.S. 250, 251 (1891); *Bishop* v. *Colaw*, —— F.2d at ——; *Crews* v. *Cloncs, supra*, 432 F.2d at 1263-64; *Richards* v. *Thurston, supra*, 424 F.2d at 1284-85, but having overlapping equal protection clause considerations since the purported limitation of the right was by a state public school official. But, our inquiry is not ended by this conclusion, because, as said in *Bishop* v. *Colaw*, —— F.2d at ——, "[p]ersonal freedoms are not absolute; they must yield when they intrude upon the freedoms of others. Our task, therefore, is to weigh the competing interests asserted here. In doing so, we proceed from the premise that the school administration carries the burden of establishing the necessity of infringing upon Stephen's freedom in order

to carry out the educational mission of the . . . High School."

So, too, we turn to the sufficiency of proof of state interest and violation of the rights of others in this case which may constitute justification for the regulation. There was no evidence that consideration of health entered into the picture; the only claimed justifications were the need for discipline and considerations of safety. We think the proof of the disruptive effect of some students having long hair was insufficient to justify the regulation and its enforcement. Proof that jest, disgust and amusement were evoked, rendering restoration and preservation of order difficult, and that there were threats of violence was insufficient. Moreover, there was no proof of the ineffectiveness of discipline of disrupters or a showing of any concerted effort to convey the salutary teaching that there is little merit in conformity for the sake of conformity and that one may exercise a personal right in the manner that he chooses so long as he does not run afoul of considerations of safety, cleanliness and decency. In short, we are inclined to think that faculty leadership in promoting and enforcing an attitude of tolerance rather than one of suppression or derision would obviate the relatively minor disruptions which have occurred.

The asserted considerations of safety need not detain us long. Unrestrained or unprotected long hair is undoubtedly a safety hazard in a welding shop or in a laboratory where Bunsen burners or other fire are present, but it is manifest that hairbands, hairnets or protective caps provide a complete solution, short of shearing one's locks. Requiring restraint or protection is, we think, the manner in which the state interest should be asserted.

Since the regulation lacks justification outweighing the minor plaintiffs' rights, the district court should declare it invalid and enjoin its enforcement in the particulars alleged.

REVERSED and REMANDED.

BOREMAN, *Senior Circuit Judge*, dissenting:

The operation of public schools and the safeguarding of public education have traditionally been the responsibility of the several states. As the Supreme Court recently declared in *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968):

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not *directly and sharply* implicate basic constitutional values. (Emphasis added.)

The issue herein, as I see it, is whether a conflict arising over the length of a schoolboy's hair and the possible effects thereof on educational environment "directly and sharply" implicates a basic constitutional value. I reach the opinion that it does not and that therefore the resolution of the conflict should be entirely within the control of the local authorities.

The majority concludes that the constitutional right involved here is "an aspect of the right to be secure in one's person guaranteed by the due process clause," with "overlapping equal protection clause considerations." It is difficult to understand how such a general and imprecise state-

ment would support a direct and sharp implication of "basic constitutional values."[1] I respectfully disagree with the implied determination of the majority that a male student's interest in maintaining a personally preferred hair style so "directly and sharply" implicates these constitutional values as to give federal courts the power and obligation to review a regulation promulgated by local school authorities such as the one here involved.

There is no hint here of an improper motivation or arbitrary procedure by the school officials in establishing the regulation or an uneven application thereof. Further, there is no specific clause in the Constitution which may be said to expressly prohibit regulation of a male student's hair length by local school authorities. Thus the invalidation of the regulation on due process grounds would appear to be no more than a substitution of the majority's judgment concerning the reasonableness of the regulation for that of the local officials. Simply stated, the school authorities, who must deal with such problems on a daily basis, say that the regulation is reasonable and necessary for reasons of safety and the maintenance of order; my colleagues say that it is not. Facts giving rise to nothing more than such differences of personal opinion and which do not clearly fall under a specific constitutional prohibition cannot, in my view, be said to "directly and sharply" implicate basic constitutional values.

---

[1] The general confusion, noted by the majority, as to precisely which constitutional right, if any, is involved when a student is prohibited from letting his hair grow to a desired length, perhaps is, in itself, indicative that there is *none*. Such confusion surely indicates to me that a specific constitutional right is not "directly and sharply" implicated.

Indeed, the majority decision might be criticized on the merits as representing a return to the day when courts regularly struck down state legislation as violative of the due process clause if the legislation was thought to be "unreasonable," a long since discarded test of constitutionality discussed fully in the dissenting opinion of the late Mr. Justice Black in *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 518-523 (1969).[2] I find it unnecessary to reach this question, however, in view of my conclusion that the matter is simply not a proper one for litigation in the federal courts.

Perhaps the fallacy inherent in the majority's reliance on the due process clause is best seen by contrasting this case with the decision of the Supreme Court in *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969). In that case the Court held unconstitutional a policy adopted by Des Moines school principals which would suspend any student who wore and refused to remove a black armband to publicize his objections to the war in Vietnam. That decision was based on the determination that the wearing of an armband was a symbolic act within the free speech clause of the First Amendment. As such, it was an act which "directly and sharply" implicated a constitutional right of precise nature. The Court expressly noted, 393 U.S. at 507-508:

> [T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States

[2] See *Waugh* v. *Mississippi University*, 237 U.S. 589, 597 (1915), wherein the Supreme Court upheld a Mississippi statute prohibiting the existence of Greek fraternities in Mississippi colleges. "It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity."

> and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See *Epperson* v. *Arkansas*. . . . Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.
>
> * * * * *
>
> The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. . . . Our problem involves direct, primary First Amendment rights akin to "pure speech."

The general rule against judicial interference with public education as expressed in *Epperson* v. *Arkansas*, *supra*, and the concerns of the late Mr. Justice Black as expressed in his dissent in *Tinker*[3] relating to the limitations of the

---

[3] Other comments of Mr. Justice Black dissenting in *Tinker* bear repetition here, 393 U.S. at 515, 524-525:

> The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools . . ." in the United States is in ultimate effect transferred to the Supreme Court.
>
> * * * * *
>
> Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to

due process clause, seem clearly applicable where, as here, the nature of the "constitutional value" asserted is nebulous and the facts only inferentially are within its protection.

It is unclear from the majority opinion as to exactly how or in what manner the equal protection clause is here implicated. The majority's holding that the issue has "overlapping equal protection clause considerations since the purported limitation of the right was by a state public school official" appears susceptible to at least three interpretations. If, as the majority's language at first blush would seem to indicate, it is meant that there is discrimination as between students and nonstudents, I would counter it is patently arguable, if not manifest, that the need for disciplinary rules designed to provide an orderly educational environment for students is present and that the resulting discrimination against them could in no way be considered invidious. If it is meant that there is discrimination as between boy students and girl students,[4] the answer is simply that long hair for girls has long been accepted as a matter of social custom and therefore constitutes no threat to an orderly educational system. If it

---

learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students . . . in all schools will be ready, able, and willing to defy their teachers on practically all orders. . . . I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States.

To me, the position taken by the majority in the instant case tends to emphasize the merit of Justice Black's observations and expressions of concern.

[4] See, *e.g.*, *Crews* v. *Clones*, 432 F.2d 1259, 1266 (7 Cir. 1970).

is meant that there is discrimination as between long-haired male students and short-haired male students with respect to the equal right to obtain an education,[5] I would submit that the right of an individual to an education in the public schools is not protected and assured in the face of his demonstrated unwillingness to obey rules of conduct designed to further the educational opportunities of all. I conclude that application of the equal protection clause, if implicated at all, is not "directly and sharply" brought into question by the facts of this case.

My colleagues' determination that there was no sufficient showing by the defendants of disruption attributable to plaintiffs' long hair poses an additional problem for me. I agree with the position of Senior Judge Duffy as expressed in his dissenting opinion in *Breen* v. *Kahl*, 419 F.2d 1034, 1039 (7 Cir. 1969), *cert. denied*, 398 U.S. 937 (1970):

> A point emphasized by the District Court and apparently approved by my colleagues, is that there was no sufficient proof that the long hair worn by Breen was a disruptive influence. However, if Breen had gone to his classes carrying a sign which stated "I am defying school regulations as to required hair length," the effect would not be different. Why is formal proof necessary for something that is so obvious? All of the students were aware of the rule forbidding the boys wearing long hair and every time Breen ap-

---

[5] See, *e.g.*, *Calbillo* v. *San Jacinto Junior College*, 305 F. Supp. 857 (S.D. Tex. 1969), remanded for reconsideration on the ground of mootness, 434 F.2d 609 (5 Cir. 1970); *Zachry* v. *Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967).

> peared with his flowing locks, he was showing his defiance of and his contempt for the school authorities and the regulations as to hair length.

A somewhat similar position was adopted by the court in *King* v. *Saddleback Junior College District*, 445 F.2d 932 (9 Cir. 1971), *cert. denied*,[6] 40 U.S.L.W. 3332 (U.S. Jan. 17, 1972), and its companion case, *Olff* v. *East Side Union High School District, Id.* The court there stated, 445 F.2d at 940:

> Much emphasis was placed upon the fact that no disruption had occurred in either school even though some of the male students wore long hair. Disruption, of course, if related, would be significant. Its absence, however, does not establish that long-haired males cannot be a distracting influence which would interfere with the educative process the same as any extreme in appearance, dress, or deportment.

In *King* and *Olff*, cases which involved regulations pertaining to hair styling very similar to the one at issue in the instant case, the court concluded, 445 F.2d at 940:

> This is not a question of preference for or against certain male hair styles or the length to which persons

---

[6] The Supreme Court has consistently declined to decide the constitutional challenge to the attempts of school authorities to proscribe a student's choice of hair style. See also *Jackson* v. *Dorrier*, 424 F.2d 213 (6 Cir. 1970), *cert. denied*, 400 U.S. 850; *Breen* v. *Kahl*, 419 F.2d 1034 (7 Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). In view of the Court's frequent recognition of an apparent obligation to resolve issues which have occasioned a division among the circuits, its apparent reluctance to review the conflict in "long-hair" cases is perhaps somewhat indicative of the importance or lack thereof which the Court attaches to the problem.

> desire to wear their hair. This court could not care less. It is a question of the right of school authorities to develop a code of dress and conduct best conducive to the fulfillment of their responsibility to educate, and to do it without unconstitutionally infringing upon the rights of those who must live under it. We do not believe that the plaintiffs have established the existence of any substantial constitutional right which is in these two instances being infringed. We are satisfied that the school authorities have acted with consideration for the rights and feelings of their students and have enacted their codes, including the ones in question here, in the best interests of the educational process. A court might disagree with their professional judgment, but it should not take over the operation of their schools.

The general rule against federal judicial interference in the public schools is supported by sound policy considerations. Primary among these is the proper allocation of power within a federal republic as influenced by the need for the expertise which comes only with first-hand knowledge and experience as to the requirements of a particular school or locality. With respect to rules of conduct and discipline as established by local officials, additional factors must be recognized. The very fact of such judicial interference, for example, must in and of itself tend to contribute to a breakdown of order and discipline. A student who successfully challenges a school policy or regulation would be encouraged to disregard other regulations and other students might well be similarly tempted.

The instant case illustrates another problem which arises when courts are willing to interfere with the control of students' conduct. As the district court below found:

> The testimony discloses that the plaintiffs have not been involved in any prior disciplinary proceeding at this school and that all four of them would be classified as below average in academic achievement. Their attendance records have been poor and they appear to have very little interest in school. All of them are failing some of their work and the plaintiff Massie is failing more than half of his subjects.
>
> The testimony indicates without doubt that the plaintiffs are intelligent young men who are not performing in school anywhere near their capacity. All of them scored more than average on the college entrance examinations. It is apparent that they have allowed their quarrel with the School Board and the high school authorities to interfere with their school work. Their attendance record prior to suspension was poor indeed. *They deliberately and intentionally allowed their hair to grow longer than permitted by the dress code and requested their favorite teacher to report them as being in violation. This was apparently done for the purpose of being suspended to test the guidelines in federal court.* (Emphasis added.)

To me these findings indicate that plaintiffs, admittedly bright and intelligent but apparently not too ambitious or successful as students, are seeking to use the federal courts as a diversion from the boredom of their school work and as a means of seeking a measure of recognition and notoriety among their fellow students. The majority decision

would seem to insure the success of their tactics as well as to foster the creation of similar future problems for the school authorities.

Fully aware of the existence of numerous decisions in which the courts are in conflict I favor the approach of the court in *Freeman* v. *Flake*, 448 F.2d 258 (10 Cir. 1971).[1] The court there stated, 448 F.2d at 259, 262:

> We are convinced that the United States Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair. The problem, if it exists, is one for the states and should be handled through state procedures.
>
> . . . . . .
>
> Complaints which are based on nothing more than school regulations of the length of a male student's hair do not "directly and sharply implicate basic constitutional values" and are not cognizable in federal courts. . . .

My position may best be summarized by quoting from the opinion of Mr. Justice Black, sitting as an individual Justice assigned to the Fifth Circuit, in *Karr* v. *Schmidt*, 401 U.S. 1201 (1971). School authorities in El Paso, Texas,

---

[1] As noted by the majority, the approach of the Fifth Circuit appears to be somewhat similar. However, that court would require only that the federal courts abstain from deciding the merits of a "long-hair" case until plaintiffs have wholly exhausted state procedures. *Wood* v. *Alamo Heights Independent School District*, 433 F.2d 355 (5 Cir. 1970); *Stevenson* v. *Board of Ed. of Wheeler County, Georgia*, 426 F.2d 1154 (5 Cir. 1970), *cert. denied*, 400 U.S. 957; *Griffin* v. *Tatum*, 425 F.2d 201 (5 Cir. 1970); *Davis* v. *Firment*, 408 F.2d 1085 (5 Cir. 1969). In agreement with *Freeman* v. *Flake*, *supra*, 448 F.2d 258, I would go further and hold that these claims are simply not cognizable in federal courts.

adopted a rule providing that schoolboys' hair must not "hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision." The district court enjoined the enforcement of this rule as violative of the Due Process and Equal Protection Clauses. The Court of Appeals for the Fifth Circuit stayed and suspended the district court's injunction and the students presented to Justice Black an "Emergency Motion to Vacate Stay of Injunction Pending Appeal." In denying this motion Mr. Justice Black stated:

> I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the States. And I furthermore refuse to predict that our Court will hold they have such power. . . . And I cannot now predict this Court will hold that the more or less vague terms of either the Due Process or Equal Protection Clause have robbed the States of their traditionally recognized power to run their school systems in accordance with their own best judgment as to the appropriate length of hair for students.
>
> The motion in this case is presented to me in a record of more than 50 pages, not counting a number of exhibits. The words used throughout the record such as "Emergency Motion" and "harassment" and "irreparable damages" are calculated to leave the impression that this case over the length of hair has created or is about to create a great national "crisis." I confess my inability to understand how anyone would thus classify this hair length case. The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution im-

poses on the United States courts the burden of supervising the length of hair that public school students should wear. The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance—the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of that States are more capable of deciding than the length of the hair of schoolboys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 States. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear.

I respectfully disssent.[8]

[8] The temptation to offer this further observation is irresistible. The hair styles worn by our founding fathers and men of past generations and the possible effects thereof on the attendance of those noted individuals *at Tuscola Senior High School* are surely not material to the case at bar. However, if such hypotheses are to be considered, I think the issue should be properly stated within the context of the traditional limitations on the powers of federal courts to interfere in state-operated public schools.

SUPREME COURT, U. S

In the Supreme Court of the United States

October Term, 1971

No. 71-956

BILLIE K. FREEMAN; Guardian of TERRY FREEMAN; VYRON RANDALL OSTLER, a minor by STEPHEN OSTLER, his father and natural guardian; MARK CHARLES SIMMONS, by and through his guardian ROBERT C. SIMMONS,

Petitioners,

vs.

ALMON FLAKE, *et als.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief for Respondent in Opposition

WILLIAM H. KING,
FELSHAW KING
Counsel for Respondents
251 East 200 South
P. O. Box 220
Clearfield, Utah 84015

INDEX

CITATIONS TO OPINIONS BELOW 1

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 5

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED 5

CONCLUSION 12

APPENDIX

Opinion of the United States Court of Appeals for the Tenth Circuit A-1

Opinion of the United States District Court for the District of Utah A-9

AUTHORITIES CITED

Bishop v. Colaw, 450 F.2d 1069 (CA 8, 1971) 6, 7, 8

Breen v. Kahl, 419 F.2d 1034 (CA 7, 1969), cert. den. 398 U.S. 937 (1970) 6, 7

Epperson v. Arkansas, 393 U.S. 97 9

Ferguson v. Skrupa, 372 U.S. 726 9

Ferrell v. Dallas Independent School District, 392 F.2d 697 (CA 5, 1968), cert. den. 393 U.S. 856 (1968) 6, 7

Freeman v. Flake, 448 F.2d 258 (CA 10, 1971) 6, 8

Ginsberg v. New York, 390 U.S. U.S. 629 11

Jackson v. Dorrier, 424 F.2d 213 (CA 6, 1970), cert. den. 400 U.S. 850 (1970) 6

King v. Saddleback Junior College, ... F.2d ..... (CA 9, 1971), cert. den. January 17, 1972, Case No. 71-498 6

Massie v. Henry, (CA 4, No. 15, 325, February 2, 1972) 6

May v. Anderson, 345 U.S. 528 11

Powell v. Alabama, 287 U.S. 45 11

Prince v. Massachusetts, 321 U.S. 158 11

Richards v. Thurston, 424 F.2d 1281 (CA 1, 1970) 6, 7

Starkey v. Board of Education, 14 U.2d 227, 381 P.2d 718 9

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 ..... 9, 11

United States v. O'Brien, 391 U.S. 367 10

CONSTITUTIONAL PROVISIONS

Constitution of Utah, Article III, ¶ 4 ..... 2, 8

STATUTES

53-6-20, Utah Code Annotated, 1953 ..... 2, 8

OTHER AUTHORITIES

Policy Manual of Davis County School District,
§ 3 ¶ 31 ..... 2, A-16

In the Supreme Court of the United States

October Term, 1971

No. 71-956

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN; VYRON RANDALL OSTLER, a minor by STEPHEN OSTLER, his father and natural guardian; MARK CHARLES SIMMONS, by and through his guardian ROBERT C. SIMMONS,

Petitioners,

vs.

ALMON FLAKE, *et als.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief for Respondent in Opposition

OPINIONS BELOW

The opinion of the United States District Court for the District of Utah is reported at 320 F. Supp. 531 and is set forth in the Appendix at pps. A-9 to A-26.

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 448 F.2d 258 and is set forth in the Appendix at pps. A-1 to A-8.

QUESTIONS PRESENTED

May the State constitutionally adopt and enforce rules limiting the length of school boys' hair when reasonably calculated to preserve discipline, decorum, safety and otherwise to enhance the educational process in public schools?

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

In addition to the constitutional provisions set forth in the Petition for Certiorari, this case also involves:

Constitution of Utah, Article III, ¶4:

> "The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control".

53-6-20, Utah Code Annotated, 1953, (Vol. 5B, p. 262):

> "Further powers of Boards of Education.—Every Board of Education shall have power and authority to . . . make and enforce all needful rules and regulations for the control and management of the public schools of the District".

Policy Manual of Davis County School District, § 3, Paragraph 31 "School Dress, Grooming and Appearance":

"All students shall maintain their hair in a clean and well-washed manner and male students shall comb and wear their hair so that it does not hang below the collar line in the back nor hang over the ears on the side and their hair must be above the eyebrows in the front. Male students shall be clean-shaven and their sideburns shall not be lower than the bottom of the ear and mustaches properly trimmed". (A-17)

STATEMENT OF THE CASE

Freeman vs. Flake actually involves three cases filed separately in the United States District Court for the District of Utah, two involving high school students and one a junior high school student, from the Davis County School District and the Alpine School District. The cases were consolidated for trial before the Honorable A. Sherman Christensen, District Judge.

After three days of trial, Judge Christensen ruled: ". . . [T]hat the enforcement of the regulations by suspension pending compliance in the context of these cases does not violate either the students' or the parents' fundamental rights of privacy, does not deny freedom of expression guaranteed and protected by the First Amendment, does not violate either procedural or substantive due process or the Equal Protection Clause of the Fourteenth Amendment, that the regulations are not unconstitutionally vague, or overly broad, and that there is no basis for enjoining their application and enforcement in the schools involved here under existing circumstances" (A-25).

In reaching this decision Judge Christensen found:

1. That the State in the area of regulation of grooming and in connection with its broader, but related functions, is advancing a vital State interest (A-23).

2. That the evidence clearly shows that the regulations were adopted after careful consideration and in the intended best interest of the educational process; that they were based upon reasonable findings supported by the evidence tending to indicate to the reasonable mind that such regulations would minimize disruption and distriction in the school, promote order and safety, redirect the attention of students from an obsession with, or reaction against, mere hair length—as an achievement or a counter-achievement, would direct attention to more productive activities and would minimize the danger of distraction from educational pursuit (A-23).

3. That those directly connected with the schools and school districts in question were in substantial agreement that the grooming code in question was beneficial, if not essential, and they have the broad support not only of the parents and administrators, but of the students in the schools (A-15).

4. That the regulation as to hair is explicit and, therefore, not void on its face for uncertainty and it is not overly broad (A-21).

5. That the evidence and final statement of Plaintiff's Counsel shows that there is no question as to procedural due process (A-20).

6. That the main reason assigned by the Plaintiffs for resistance to the regulation was that they

"wanted" to have longer hair, they "liked" it and they thought it was their "right" and they were not expressing any form of symbolic speech with which special sensitivity beyond ordinary respect for constitutional limitations must be protected under the First Amendment (A-21).

7. That long hair creates negative attitudes, if not opposition, from the majority of students, that those with long hair tend to isolate themselves from the mainstream of student activity and long hair in the climate of the time is disruptive within the schools in question of proper school discipline and the learning process to an extent and that there is a correlation between long hair and improper grooming aside from hair (A-15).

8. That between close-shaven hair and the limits of the regulation there is a considerable leeway for individual taste (including what may be regarded by many as long hair for male students) (A-16).

The United States Court of Appeals for the Tenth Circuit affirmed, 448 F. 2d, 258. In doing so the Court stated that the schoolboards offered justification for the regulations and that no claim was made of any racial or religious discrimination and that there was nothing in the record to indicate that the hair regulations were motivated by other than legitimate school concerns (A-3).

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

1. Factual Distinctions Resolve the Apparent Conflict of Decisions Concerned with Hair Length of Children in Public Schools.

The United States Courts of Appeals from eight separate Circuits have now ruled on the question of public school regulations limiting the length of hair of school boys. These cases are:

Ferrell vs. Dallas Independent School District, 392 F. 2d 697 (CA 5, 1968), cert. den. 393 U.S. 856 (1968).

Breen vs. Kahl, 419 F. 2d 1034 (CA 7, 1969), cert. den. 398 U.S. 937 (1970).

Jackson vs. Dorrier, 424 F. 2d 213 (CA 6, 1970), cert. den. 400 U.S. 850 (1970).

Richards vs. Thurston, 424 F. 2d 1281 (CA 1, 1970).

King vs. Saddleback Junior College, 445 F.2d 932 (CA 9, 1971), cert. den. January 17, 1972, Case No. 71-498.

Freeman vs. Flake, 448 F. 2d 258 (CA 10, 1971) Appendix, pp. A-9-A-29.

Bishop vs. Colaw, 450 F. 2d 1069 (CA 8, 1971).

Massie v. Henry, (CA 4, No. 15, 325, February 2, 1972).

The Courts of Appeals for the Fifth, Sixth, Ninth and Tenth Circuits upheld the school regulations in the *Ferrell, Jackson, King* and *Freeman* cases and four Circuits, the First, Fourth, Seventh, and Eighth, have refused to uphold the school regulations, those decisions being in the *Richards, Breen, Bishop*, and *Massie* cases.

Under these circumstances, there is an apparent conflict in the decisions among the various Circuits; however, these apparent conflicts can be reconciled on the facts when the cases are analyzed and distinguished.

In *Richards*, each side relied on the failure of the other to sustain its burden of proof. The Court recognized that school officials have the authority to take appropriate action in facing a problem of discipline or distraction but held that in the absence of an inherent, self-evident justification on the face of the rule, the burden is on the school to show justification for the rule and since no justification had been offered at the time of the trial, the rule was not upheld.

A similar analysis holds true in the *Breen case*. In that case, the Court relied upon the finding of the trial Court that there was no showing of any possible justification for the regulation (419 F.2d 1034, 1037). The Court found that the failure of the school to sustain its burden of substantial justification for the rule distinguished *Breen* from the *Ferrell* case which upheld the school. *Breen*, therefore, distinguishes itself from *Ferrell* and the other Circuits upholding school hair regulations.

Similarly, even while refusing to uphold a hair regulation, the *Bishop* case recognized that in those Circiuts which have upheld them, the schools had demonstrated the reasonableness of the regulations by showing violations had, in fact, caused school disruptions. The school failed to make such a showing in *Bishop* and the regulation was not upheld.

The *Massie* case reached a similar result in finding the school had not met its burden of justifying the rule.

In all of the cases from the Fifth, Sixth, Ninth, and Tenth Circiuts the Courts found that there was justification for the rule. In *Freeman* the Court found evidence of actual disrûption and other justifications for the rule. Even in the cases not upholding the rules, the Courts found that while the schools had the constitutional authority to adopt such rules, that they had not met their burden of showing justification for them as they had done in the cases upholding the rules in the other Circuits. No Circuit has ruled that the schools do not have the Constitutional authority to adopt and enforce such rules. It was basically these factual differences which brought about the different results. The Circuits are all in substantial accord on the law and there is, therefore, no significant conflict among the Circuits which would indicate the necessity of granting the Petition for Certiorari.

2. The Courts Should Exercise Care and Restraint in Intervening in the Operation of Public School Systems.

The Constitution of Utah provides in Article III, ¶4 that the Legislature shall make laws for the establishment and maintenance of a public school system. In following this Constitutional mandate the Legislature has provided that "Every Board of Education shall have power and authority to . . . make and enforce all needful rules and regulations for the control and management of the public schools of the district." (53-6-20, Utah Code Annotated, 1953.)

The trial court found that the regulations were based upon reasonable findings of the school administra-

tors and that such findings were supported by the evidence at the trial (A-23).

The Court of Appeals stated that there was nothing in the record to indicate that the hair regulations were motivated by other than legitimate school concerns (A-3).

Under these circumstances, the Court should not substitute its judgment for the expertise, judgment, and years of experience of school administrators and elected boards of education. *Epperson vs. Arkansas*, 393 U. S. 97; *Tinker vs. Des Moines Independent Community School District*, 393 U. S. 503; *Ferguson vs. Skrupa*, 372 U. S. 726, 730; *Starkey vs. Board of Education*, 14 Utah 2d 227, 381 P. 2d 718.

In *Epperson* the Court stated at 393 U. S. 104:

> "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not *directly* and *sharply* implicate *basic* constitutional values." [Italics added]

In *Tinker* it was stated at 393 U. S. 507:

> "[The] Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with *fundamental* constitutional safeguards to prescribe and control conduct in the schools." [Italics added]

When a few school boys wear their hair in violation of the grooming codes adopted in the best interests of the school for no other reason than because they "like" it or "want" it that long while at the same time specifically disclaiming the expression or dramatization of any

moral, sociological, political, religious or idealogical viewpoint, it is submitted that such conduct does not *directly* and *sharply* implicate *basic* or *fundamental* constitutional values and that the authority to resolve this and similar problems arising in the daily operation of the schools should remain vested in school officials.

3. The Hair Regulation Does Not Violate the Constitutional Rights of Petitioners.

Petitioners infer that the hair styles involved in this case may be the symbol of a youth culture which has challenged the established order. The students themselves specifically disclaimed this and the District Court so found (A-21). The wearing of long hair obviously does not involve pure speech nor does it involve symbolic speech under the First Amendment unless there is some intention to communicate a thought or contribute to the "storehouse of ideas" through conduct rather than words. Even so, not all symbolic speech or conduct is entitled to First Amendment protection as was recognized in *United States vs. O'Brien*, 391 U. S. 367:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct contends thereby to express an idea."

As indicated, the students stated in the trial that they did not intend to express any idea whatsoever by wearing long hair and such conduct does not, therefore, involve a *basic* or *fundamental* constitutional right entitled to First Amendment protection.

The hair regulation in question is reasonable and the

schools showed justification for it. It does not touch upon behavior involving "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", (*Powell vs. Alabama*, 287 U. S. 45, 67).

The length of hair of school boys in public schools is, therefore, the proper subject of reasonable regulation and the school rules in question do not violate the provisions of the First, Fourth, Ninth or Fourteenth Amendments to the Constitution of the United States.

4. The Constitutional Rights of Children Are Not Coextensive with the Constitutional Rights of Adults.

Children do not occupy the same position as adults in our society, *May vs. Anderson*, 345 U. S. 528, and while school children are not devoid of constitutional rights, *Tinker*, supra, it must be recognized that the power of the State to control the conduct of children reaches beyond the scope of its authority over adults, *Prince vs. Massachusetts*, 321 U. S. 158; *Ginsberg vs. New York*, 390 U. S. 629.

These principles are of particular importance within a school system where many children are in close proximity. There is a need to establish and enforce reasonable rules and regulations to provide an environment conducive to the learning process, since teaching of children is the primary purpose for which the State establishes and operates schools.

It is within this context that the necessity for granting certiorari should be evaluated. Such evaluation mitigates against granting certiorari and in favor of the

proposition that the Court should refrain from interfering in the administration of the public schools except as to matters directly and sharply implicating basic constitutional values which this case does not.

5. Uniformity of Appearance Is Not the Purpose or Effect of the Rule.

As found by the trial court, the rule in question does not impose uniformity of appearance upon the school children, for there is a wide range of latitude between closely shaven hair and the limits of the rule which would provide for individual expression including what many would consider long hair (A-16). The rule also allows for individual expression by providing that sideburns may be worn to the bottom of the earlobe and neatly trimmed mustaches may be worn. What the rule does attempt to accomplish, rather than uniformity of appearance, is to help create a proper atmosphere and environment conducive to the learning process.

CONCLUSION

The opinions of the various Circuits which have ruled on these matters are in substantial accord on the law, although different results have been reached primarily on the facts. The Circuits are therefore not divided to the extent that certiorari should be granted for clarification. The hair regulation in question is reasonable and proper and does not involve or implicate basic or fundamental constitutional rights and under these

circumstances, the responsibility for the administration of the schools should be left with the school officials and the petition for certiorari should be denied.

Respectfully submitted,

William H. King,
Felshaw King

Attorneys for Respondents

Opinions of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SEPTEMBER TERM, 1971

No. 71-1007

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN, *et al.*,

Plaintiffs-Appellants,

v.

ALMON FLAKE, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH (D.C. NOS. NC 36-70, 37-70, 249-70)

No. 71-1051

AL WHITE, a Minor, by his Father, V. T. WHITE,

Plaintiff-Appellee,

v.

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, *et al.*,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D. C. NO. 8485)

No. 71-1072

GREGORY A. CRANSTON and RANDALL J. CRANSTON, Minors, by and through their Natural Guardian, WALTER N. CRANSTON, *Plaintiffs-Appellants,*

v.

EAST OTERO SCHOOL DISTRICT R-1, *et al.*, *Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D. C. NO. C-3550)

JAMES N. BARBER (Richard M. Day on the brief), *for Plaintiffs-Appellants in* No. 71-1007.

FELSHAW KING (William H. King on the brief), *for Defendants-Appellees in* No. 71-1007.

JOEL M. GORA and DAN MCKINNON, III (Melvin L. Wulf and Paul A. Phillips on the brief), *for Plaintiff-Appellee in* No. 71-1051.

MACK EASLEY of Easley & Reynolds, *for Defendants-Appellants in* No. 71-1051.

STEPHEN F. WILLIAMS, *for Plaintiffs-Appellants in* No. 71-1072.

BENJAMIN L. CRAIG (Peter M. Eggleston and Ralph N. Wadleigh on the brief), *for Defendants-Appellees in* No. 71-1072.

Before:

PHILLIPS, BREITENSTEIN and HILL, *Circuit Judges.*

BREITENSTEIN, *Circuit Judge.*

Regulation of hair styles of male students in state public schools is becoming a matter of major concern to

federal courts if one is to judge by the ever-increasing litigation on the subject or by the days of court time expended, and the lengthy briefs presented, in the cases now before us. We are convinced that the United States Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair. The problem, if it exists, is one for the states and should be handled through state procedures.

We have three cases, one each from Utah, New Mexico, and Colorado. In each, one or more students were suspended for violation of the school regulation on the length of hair of male students. Jurisdiction is asserted under 28 U.S.C. § 1343 and the claims are based on § 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983. Although the regulations differ in language, they essentially require that the hair should not hang below the collar line in the back, the ears on the side, or the eyebrows in front. The evidence need not be detailed. It is remarkably similar in each case. The students desired to express their individualities and the school boards offered justification for the regulations. No claim is made of any racial or religious discrimination. We find nothing in the record to indicate that the hair regulations were motivated by other than legitimate school concerns. The federal district courts in Utah and Colorado upheld the regulations and in New Mexico the regulation was rejected as infringing on constitutional rights.

The federal circuits are sharply divided on the constitutionality of regulations pertaining to the length of the hair of male students in state public schools. The students have prevailed in the First and Seventh Circuits.

See Richards v. Thurston, 1 Cir., 424 F.2d 1281; Breen v. Kahl, 7 Cir., 419 F.2d 1034, cert. denied 398 U.S. 937; and Crews v. Cloncs, 7 Cir., 432 F.2d 1259. The school regulations were upheld in the Fifth, Sixth, and Ninth Circuits. See Stevenson v. Board of Education of Wheeler County, Georgia, 5 Cir., 426 F.2d 1154, cert. denied 400 U.S. 957; Ferrell v. Dallas Independent School District, 5 Cir., 392 F.2d 697, cert. denied 393 U.S. 856; Jackson v. Dorrier, 6 Cir., 424 F.2d 213, cert. denied 400 U.S. 850; Gfell v. Rickelman, 6 Cir., 441 F.2d 444; and King v. Saddleback Junior College, 9 Cir., ... F.2d ..... In Griffin v. Tatum, 5 Cir., 425 F.2d 201, the court held invalid that portion of a regulation which required that the back hair be tapered rather than blocked.

No apparent consensus exists among the lawyers for the students as to what constitutional provision affords the protection sought. Reliance is variously had on the First, Fourth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States and on the penumbra of rights assured thereby. The uncertainty of position complicates, rather than clarifies, the issue. The briefs and arguments for the students cavalierly dismiss, or entirely fail to discuss, the problem of federal intervention in the control of state schools in the absence of a direct and positive command stemming from the federal constitution. The hodgepodge of reference to many provisions of the Bill of Rights and the Fourteenth Amendment shows uncertainty as to the existence of any federally protected right.

All of the briefs for the students rely on Tinker v.

Des Moines Independent Community School District, 393 U.S. 503, and Griswold v. Connecticut, 381 U.S. 479. Tinker was concerned with the suspension of three students for wearing to school black armbands to publicize their objection to Vietnam hostilities. The Court held that the conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. The Court said that the wearing of armbands was closely akin to pure speech and that, 393 U.S. 507-508:

> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment."

We believe that the effect of this statement is to eliminate hair style from any impact of the decision. The wearing of long hair is not akin to pure speech. At the most it is symbolic speech indicative of expressions of individuality rather than a contribution to the storehouse of ideas. With reference to symbolic speech, the Supreme Court said in the draft card burning cases, United States v. O'Brien, 391 U.S. 367, 376:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Recognition of the principle that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," 393 U.S. at 506, does not mean that the First Amendment contains an express command that the hair style of a male student in the public schools lies within the protected area.

Griswold held that a Connecticut statute forbidding the use of contraceptives violated the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights. 381 U.S. at 481-486. We agree with the Ninth Circuit that the conduct controlled by the hair style regulation "is not conduct found in the privacy of the home but in public educational institutions where individual liberties cannot be left completely uncontrolled to clash with similarly asserted liberties of several thousand others." King v. Saddleback Junior College, 9 Cir., ... F.2d ....., slip opinion p. 8 and authorities cited in note 11. A school regulation on the length of a student's hair is not comparable to a state statute regulating behavior in the privacy of a bedroom.

Perhaps the strongest constitutional argument which can be made on behalf of the students is based on the "liberty" assurance of the Due Process Clause of the Fourteenth Amendment. It was on this ground that the First Circuit held for the student in Richards v. Thurston, see 424 F.2d at 1284-1286, a case in which no justification was offered for the regulation. Reliance on justification carries with it the concept that a regulation affecting the due process guarantee of liberty depends for its validity on the reasonableness of the limitation placed on the regulated conduct. The evanescent nature of this standard is illustrated by the three cases before us. On unsurprisingly similar justifications two federal district courts upheld the regulations and one held to the contrary.

We doubt the applicability of the test of reasonableness in the determination of the nebulous constitutional rights here asserted. The issue should not turn on

views of a federal judge relating to the wisdom or necessity of a school regulation controlling the length of hair worn by a male student in a state public school. In Ferguson v. Skrupa, 372 U.S. 726, 730, the Court said that the courts will not "substitute their social and economic beliefs for the judgment of legislative bodies." The same principle is pertinent to dress codes of school boards. We do not read Griswold v. Connecticut as overruling Ferguson v. Skrupa. The Griswold decision turned on specific issues there presented. See 381 U.S. at 482.

The remedy provided by § 1983 is supplementary to any pertinent state remedy. See Monroe v. Pape, 365 U.S. 167, 183. The proliferation of litigation resulting from the expanded use of § 1983 is apparent to anyone familiar with the reported decisions of the courts of the United States. The existence of the § 1983 remedy does not require that federal courts entertain all suits in which unconstitutional deprivations are asserted. A federal constitutional question must exist "not in mere form but in substance, and not in mere assertion, but in essence and effect." Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 388, 397.

The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools. In speaking of judicial interposition in the operation of the public school systems, the Supreme Court said in Epperson v. Arkansas, 393 U.S. 97, 104:

> "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Whether the allegations of a complaint state a claim for relief is a question of law. Bell v. Hood, 327 U.S. 678, 682. Complaints which are based on nothing more than school regulations of the length of a male student's hair do not "directly and sharply implicate basic constitutional values" and are not cognizable in federal courts under the principles stated in Epperson v. Arkansas. It follows that each of the complaints with which we are concerned should have been dismissed for failure to state a claim on which relief can be granted.

The judgments of dismissal in No. 71-1007, the Utah case, and in No. 71-1072, the Colorado case, are severally affirmed. In No. 71-1051, the New Mexico case, the judgment is reversed and the case remanded with directions to dismiss.

Opinion of the United States District Court for the District of Utah

UNITED STATES DISTRICT COURT

D. UTAH, N. D.

OCT. 2, 1970

Nos. NC 36-70, 37-70 and 249-70

BILLIE K. FREEMAN, Guardian of Terry Freeman,

Plaintiff,

v.

ALMON FLAKE, Principal of Viewmont High School, the BOARD OF EDUCATION OF DAVIS COUNTY SCHOOL DISTRICT, and IRVIN R. CLEVERLY, MORRIS HANSEN, HENRY E. PETERSON, LYNN W. BURTON, and HAROLD J. GAILEY, members of the Board of Education of Davis County School District, and BERNELL WRIGLEY, Superintendent of Davis County Schools,

Defendants.

VYRON RANDALL OSTLER, a minor, by Stephen B. Ostler, his father and natural guardian,

Plaintiff.

v.

BERNARD YOCUM, LAWRENCE L. COOK, LYNN WILCOX, and the BOARD OF EDUCATION OF DAVIS COUNTY SCHOOL DISTRICT,

Defendants.

MARK CHARLES SIMMONS, by and through his guardian Robert C. Simmons,

Plaintiff,

v.

CLIFTON PYNE, Principal of Orem High School, and the BOARD OF EDUCATION OF ALPINE SCHOOL DISTRICT, and DR. BOYD J. LARSEN, FRANK C. GREENWOOD, ELI C. CLAYSON, DR. R. PHIL SHUMWAY, HARVEY E. SMITH, members of the Board of Education of Alpine School District,

Defendants.

JAMES N. BARBER and RICHARD M. DAY, Salt Lake City, Utah, *for Terry Freeman and Mark Charles Simmons.*

FRANK S. WARNER, Ogden, Utah, *for Vyron Randall Ostler.*

FELSHAW KING, Clearfield, Utah, *for Almon Flake and others and Bernard Yocum and others.*

HARVARD R. HINTON, Lehi, Utah, *for Clifton Pyne and others.*

CHRISTENSEN, *District Judge.*

The above-entitled cases, consolidated for trial because they involve common questions of fact and law, present questions concerning the power of school boards in the State of Utah, and school officials acting under them, to promulgate and enforce regulations dealing with the length of hair of students and related matters of appearance and grooming.

In No. NC 36-70, Freeman v. Flake, plaintiff, represented by his mother as guardian, is a student in Viewmont High School, one of the schools maintained and administered by Davis County School District, State of Utah. It is alleged that on or about September 17, 1970, the defendant Principal suspended or expelled this student preventing him from attending further classes, all without justification, legal excuse or opportunity for hearing, but because of the refusal of Terry Freeman to comply with the defendants' orders or regulations relating to the length or style of students' hair.

In NC 37-70, Ostler v. Yocum, the plaintiff was enrolled as a student in Sunset Junior High School, one of the junior high schools maintained and administered by

the Board of Education of Davis County School District. It is alleged that on or about September 16, 1970, the defendant Yocum requested the vice-principal and the principal of this school to suspend or expel the plaintiff; and that the defendants have subsequently prevented plaintiff from entering or attending any classes at the Sunset Junior High School because of the plaintiff's refusal to comply with the defendants' orders or regulations relating to the length or style of hair.

In No. C 249-70, Simmons v. Pyne, similar allegations are made on behalf of Simmons.

The evidence shows that the students were suspended because of their refusal to comply with the regulations as to length of hair, that while Freeman was performing marginally otherwise, the suspension could not be justified on other grounds. Simmons and only to a lesser extent Ostler were considered good students aside from the problem involved here. The hair of all three was persistently maintained in a manner to clearly violate the requirements in question and abundant opportunity was afforded each to bring himself into compliance before the suspensions. Freeman and Ostler have the opportunity of keeping up their school work through home teachers provided by the defendants during their periods of suspension. Simmons has now had his hair cut sufficiently to bring him into compliance with the regulation and is in school without abandoning his contention that his future conduct will be unconstitutionally restricted unless the regulation is declared invalid. I do not think that the case is moot for this reason. Ostler is the only one who gave any reason other than general ones for his resistance to the rules, claiming that long hair was necessary

to cover a scar on his head. Personal inspection is convincing that the scar is covered equally well by length within the regulation. There is nothing in the evidence to suggest that this was his real reason for non-compliance or that if it was the school authorities would not permit any reasonable departure in view thereof.

Jurisdiction in each case here is claimed on the basis of 28 U.S.C. § 1343, 42 U.S.C. §§ 1983 and 1985, upon amendments I, IV, IX and XIV of the Constitution of the United States, and upon 28 U.S.C. §§ 2201, 2202. This court does have jurisdiction over the subject matter of the actions and the persons of the parties.

In the first two cases venue is appropriately laid in the Northern Division of the District of Utah; and upon consolidation the third case was transferred, with the consent of the parties and pursuant to the rule of court, for disposition in the Northern Division in connection with the prior cases.

The cases initially came before the court on applications for restraining orders and preliminary injunctions pendente lite; but by reason of the urgency of an early determination, and in order to avoid duplication by separate hearings with reference to preliminary injunctive relief and upon the final merits, the parties have stipulated and the court has approved the hearing of the cases upon their final merits at this time, there having been a waiver of time for pleading and pre-trial discovery and a stipulation that except as indicated otherwise in the evidence the complaints in the cases may be deemed denied by the respective defendants.

Evidence has been taken over a period of three

days; in addition pre-trial briefs and oral arguments of counsel have been considered. The court now considers itself fully advised and believes it essential in the public interest, for the welfare of the students directly involved and the student bodies of the schools generally to announce its decision without further delay.

Contending that each answer must be in the affirmative, the plaintiffs present the following questions for determination:

1. Whether requiring a student to conform to a regulation governing length or style of hair as a prerequisite to attending a public school violates his and his parents' fundamental rights of privacy guaranteed by the First Amendment and the "penumbra" of the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States.

2. Whether suspension or expulsion of a student from public school for wearing long hair denies him the freedom of expression guaranteed and protected by the First Amendment.

3. Whether suspension or expulsion of a student from public school for failure to comply with a regulation published or unpublished, governing the length or style of hair, violates the Due Process Clause of the Fourteenth Amendment.

4. Whether a regulation which prevents students from attending public schools solely because of the length of their hair is a violation of the Equal Protection Clause of the Fourteenth Amendment as an unreasonable classification.

5. Whether the regulation under which plaintiffs were suspended or expelled is unconstitutionally vague.

I have indulged a wide range of evidence in these cases to have assurance that no significant points are overlooked. The students involved and their witnesses, as well as the experts, have been permitted rather freely to express their opinions concerning the regulations in question, as well as general problems of student relationships and school administration.

With much of what has been said on behalf of each side, I can agree—the importance of individual liberty in schools as well as out, the requirement to observe constitutional limitations in school as well as out, the necessity of reasonable regulations to advance and to protect the learning process, the desirability of collaboration and mutual discussion in the formulation of school policies, the necessity or ultimate responsibility upon school administrators to administer and upon teachers to teach, the desirability that every student, without interference, receive in-school training with the maximum self-determination and liberty consistent with the functioning of a school, the learning process and the rights of others, and the necessity that those defying reasonable regulations not be permitted to break down school administration in perversion of their own attitudes and the destruction of a system indispensable to the discharge of the mission of the schools.

There is much in the testimony with which I do not agree. I cannot accept the contention that all people wearing long hair are mentally ill on the one hand, or on

the other that they are as a general rule more creative or scholarly than those who do not. I do not agree that the function of a school is necessarily to teach the philosophy of the majority of the patrons of school, much less the philosophy of a minority of the patrons or of those who have no connection with its problems. It is questionable that there is any inherent or necessary correlation between long hair and improper conduct. There is evidence indicating that long hair creates negative attitudes if not opposition from the majority of students, that those with long hair tend to isolate themselves from the main stream of student activity and that long hair in the climate of the time is disruptive within the schools in question of proper school discipline and the learning process to an extent.

The experts and the evidence in general are in substantial agreement that beyond whatever excessively long hair indicates about the personal attitude and mind of individuals it has become within the fabric of our society a symbol of dissatisfaction and protest to which a substantial number of people, for reasons sufficient to themselves, respond and with which young minds in the process of resistance to authority are likely to identify without any real ideological view except the testing of parental or school authority. There seems to be a correlation between long hair and improper grooming aside from hair.

There was a sharp difference of opinion as to the necessity or benefits of the regulations in question in these or other schools among the witnesses, but those directly connected with the schools and school districts in question were in substantial agreement that they were beneficial if not essential, and there is indication that

they have the broad support not only of the patrons and administrators but of the students therein.

It should be noted that in what has been said hereinbefore and in the discussion which follows the term "long hair" generally is used to refer to hair of a junior or senior high school male student permitted to grow substantially beyond the limits referred to in the regulation in question. That is not to say that hair within the limits may not be considered "long", depending upon the viewpoint. And I am impressed with the statement of one of the witnesses that between close shaven hair and the limits of the regulation there is a considerable leeway for individual taste (including what may be regarded by many as long hair for male students). And I must emphasize that anything which has been or will be said about "long hair" in no way is intended as a moral or ideological judgment. We are not concerned with any point except the right of junior or high school students to wear long hair beyond and in defiance of school regulations, and we are not concerned necessarily with this question in the abstract but with reference to the specific regulations involved here and under the circumstances shown by the evidence.

While the applications vary somewhat among the cases, the regulation of the Davis County School Board on the subject in question is characteristic and raises all of the issues with which we are concerned in these cases:

> "The Board of Education of the Davis County School District, in support of the aims of public education, recognizes that standards of proper dress and grooming seriously affect the behavior of stu-

dents attending school. Experience has demonstrated that the atmosphere for a good learning situation and a wholesome academic environment is improved when proper dress, proper grooming and when proper standards of decorum and discipline are adhered to by the studentbody. The Board of Education, therefore, strongly urges that every effort be made to promote and maintain such personal maturity and development.

"As a student seeks purposely to draw attention to himself through oddities of dress and styles, he is usually displaying a false sense of values and will, quite likely, not fulfill himself academically in his school and his studies. Furthermore, experience indicates that there are sanitation and safety factors directly related to proper dress and grooming. Furthermore, experience indicates there is a real and reasonable connection between proper dress and grooming and the successful operation of the educational system with the maintenance of school discipline. Therefore, the Board of Education of the Davis County School District sets the following standards for school dress and appearance:

"1. All students shall maintain their hair in a clean and well-washed manner and male students shall comb and wear their hair so that it does not hang below the collar line in the back nor hang over the ears on the side and their hair must be above the eyebrows in the front. Male students shall be clean shaven and their sideburns shall not be lower than the bottom of the ear and mustaches properly trimmed.

"2. All students shall be required to wear clean clothing and no immodest form or manner of dress shall be allowed. Shorts and other similar attire shall not be worn nor shall any clothing be worn which displays obscene or suggestive words or pictures nor shall any clothing be worn which is so extreme or odd that it may disrupt or tend to disrupt or interfere with school functions. School officials may require students to wear certain types of clothing for health or safety reasons in connection with certain specialized activities.

"If a student does not comply with these regulations upon direction of the principal, he may be suspended from school until such time as he does comply. Any student so suspended shall in any event be required to bring his parents or guardian to school for a conference with the principal before reinstatement at which time the principal may decide to reinstate the student or to continue the suspension.

"In the event the principal decides to continue the suspension after having met with the parents or guardian, the student, through his parents or guardian, shall have a right to appeal the decision of the principal to the Director of Pupil Personnel of the Davis County School District within Ten (10) days after the decision of the principal. The Director shall thereafter set a time for conducting a conference at which time the student, parents or guardian shall be given a hearing. At the conclusion of such informal hearing the Director shall either affirm the decision of the school principal or order the student reinstated.

"If the Director affirms the decision of the school principal, the student, through his parents or guardian, may appeal in writing to the Superintendent of Schools within Ten (10) days from the date of such decision. The Superintendent of Schools as the Executive Officer of the Board of Education shall thereafter review the decision of the Director of Pupil Personnel, with or without holding a hearing, and thereafter render a decision affirming the decision of the Director or ordering the student reinstated.

"At all times during the aforementioned appeal procedures, the student shall remain on suspension unless otherwise ordered by the Superintendent of Schools."

The Alpine School District Regulation is substantially the same with reference to length of hair, although varying in other respects. They were put in their present form shortly before the suspensions in question, but their content and substance have been in force and well understood over a substantial period of time theretofore.

There is no question of the statutory and inherent right of school boards within the State of Utah to promulgate and appropriately enforce reasonable regulations concerning the conduct, deportment, and grooming of students attending public schools placed under their administrative control, providing that such regulations do not offend rights guaranteed by the Constitution of the United States. Starkey v. Board of Education of Davis County School District, 14 Utah 2d 227, 381 P.2d 718 (1963); Beard v. Board of Education, 81 Utah 51, 16

P.2d 900 (1932); Davis v. Ogden City, 117 Utah 315; 215 P.2d 616 (1950); State v. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (1959).

The point has been advanced, more by way of suggestion in the pleadings or in inferential argument rather than solidly set out, that some problem of procedural due process is involved. The evidence and the final statement of plaintiffs' counsel have set such point at rest, for it now seems clear that the students involved were well aware of the regulations, had been repeatedly admonished in view of them, had, with the knowledge and acquiescence, if not support, of their parents elected to defy them and had rejected the known and established sysetm of review through higher administrative authority. I do not believe that failure to exhaust administrative remedies would bar relief here under the civil rights acts but I am also of the opinion, confirmed by the statements of counsel, that procedural due process is not in issue.

Whatever uncertainty might exist concerning the term "proper grooming" in other respects, this is not involved in the present cases; becaues the school authorities acted upon the express requirements of length of hair, the validity of the regulations with respect thereto is the only point here.

I must reject the argument by counsel for one of the plaintiffs that the regulation is uncertain or overly broad. General reference to "proper grooming" is not in question now. Indeed, the regulation as to hair is explicit, and if there were any way to draw lines, the lines have been rather specifically drawn in language

that no student could misunderstand. And if a line is permissible some place, it seems that the line drawn of not below the collar, not over the eyes, or not over the ears, is as manageable and reasonable as any other having practical significance. Thus, I hold that the regulation is not void on its face for uncertainty or overbreadth and that we must look further into its nature and effect in order to determine its constitutionality.

Nor need we pause long at the contention that length of hair beyond the regulation is in itself a form of symbolic speech which with especial sensitivity beyond ordinary respect for constitutional limitations must be protected under the First Amendment. It is argued that such conduct, like words, can be an expression or dramatization of a moral, sociological, political, religious or idealogical viewpoint. However the argument may be sustained in another context, more is required here than counsel's suggestion that the plaintiffs perhaps were indicating a profound or hidden ideological view unknown even to themselves and thus that the right of symbolic free speech might be involved. The main reason assigned by the plaintiffs for resistance to the regulation was that they "wanted" to have longer hair, they "liked" it and they thought it was their "right".

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), does not suggest that this is "symbolic, free speech". On the contrary, this case states, among other things:

> "The problem posed by the present case does not relate to regulations of the lentgh of skirts or the type of clothing, to hair style, or deportment.

> Cf. Ferrell v. Dallas Independent School District, 392 F.2d 697 ([5th Cir.] 1968; Pugsly v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"

And in United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), the Supreme Court said:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

As noted by Judge Doyle in Brick v. Board of Education, Sch. Dist. No. 1, Denver, Colo., 305 F.Supp. 1316, (D. Colo. 1969):

> "This does not mean though that conduct of the kind here in question does not have any constitutional protection. It is protected to the extent that the due process clause of the Fourteenth Amendment prohibits the arbitrary deprivation of liberty. This right is, however, both substantively and procedurally distinct from the paramount right to freedom of speech * * * Legislative power in this area is circumscribed to a much greater degree than in the area of conduct, and courts require that such a regulation is necessitated by a compelling state interest before its constitutionality will be sustained * * * On the other hand, the role of a federal court in reviewing claims that state regulations of liberty violate substantive due process is relatively narrow."

In Tinker v. Des Moines Sch. Dist., *supra*, neither the trial court nor the Supreme Court reached the question whether even in the sensitive free speech area a

regulation was justifiable in circumstances similar to the present ones before the court.

If we are to extrapolate a result from *Tinker* and the cases dealing more precisely with conduct as distinguished from speech, in the context of the evidence before this court, it would be that school board action reasonably designed to foster legitimate educational aims and to promote the learning process, order or safety of students will be sustained if not arbitrary or capricious. The state in the area of regulation of grooming and in connection with its broader but related functions is advancing a vital state interest. Those activities which have a disruptive effect on the learning atmosphere in public schools are not improper subjects for regulation.

The evidence in my opinion clearly shows that not only were he regulations with regard to hair length adopted after careful consideration and in the intended best interest of the educational process, but they were based upon reasonable findings supported by the evidence tending to indicate to the reasonable mind that such regulations would minimize disruption and distraction in the school, promote order and safety, redirect the attention of students from an obsession with, or reaction against, mere hair length—as an achievement or a counter-achievement—would direct attention to more productive activities, and would minimize the danger of distraction from educational pursuits. Others considering such evidence might come to a different conclusion but this does not destroy the underpinnings of the boards' determinations, since those boards, rather than others, are charged with the legal responsibility of adopting regulations consistent with constitutional

limitations and the dictates of reason. I reject any broad notion that within those limitations federal judges are established as overseers to regulate the exercise of state discretion as well as to see that constitutional limitations are not breached.

Under circumstances having some relationship to the present cases, many courts have sustained similar regulations. Leonard v. School Committee, 349 Mass. 704, 212 N.E.2d 468, 14 A.L.R.3d 1192; Davis v. Firment, 269 F. Supp. 524, (D.C.La.), aff'd., 408 F.2d 1085 (5th Cir. 1967); Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968); Akin v. Board of Education of Riverside Unified School District, 262 Cal.App.2d 161, 68 Cal.Rptr. 557 (1968); Brick v. Board of Education, Sch. Dist. No. 1, Denver, Colorado, 305 F.Supp. 1316 (D.C. Colo.1969); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970); Stevenson v. Wheeler County Board of Education, 426 F.2d 1154 (5th Cir. 1970); Neuhaus v. Torrey, 310 F.Supp. 192 (D.C.Cal.1970); Farrell v. Smith, 310 F.Supp. 732 (D.C.Maine 1970); Crews v. Clones, 303 F.Supp. 1370 (D.C.Ind.1969); Pritchard v. Spring Branch Independent School District, 308 F.Supp. 570 (D.C.Tex 1970); Wood v. Alamo Height Independent School District, 308 F.Supp. 551 (D.C.Tex.1970); Christmas v. El Reno Board of Education, 313 F.Supp. 618 (D.C. Okl.1970); Other courts have reached contrary conclusions on facts which bear some similarity to the present cases. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937, 90 S.Ct. 1836, 26 L.Ed.2d 268 (1970); Westley v. Rossi, 305 F.Supp. 706 (D.C.Minn.1969); Griffin v. Tatum, 300 F.Supp.

69 (D.C. Ala.1969), affd, in part, 425 F.2d 201 (5th Cir. 1970); Olff v. East Side Union High School District, 305 F.Supp. 557 (D.C.Cal.1969); Richards v. Thurston, 304 F.Supp. 449 (D.C.Mass.1969), affd., 424 F.2d 1281 (1st Cir. 1970); Calbillo v. San Jacinto Junior College, 305 F.Supp. 857 (D.C. Texas 1969); Lucia v. Duggan, 303 F.Supp. 112 (D.C.Mass. 1969); Finot v. Pasadena City Board of Education, 250 Cal. App.2d 189, 58 Cal.Rptr. 520 (1967). Counsel have not reported nor have I been able to find that either the United States Court of Appeals for the Tenth Circuit or the Supreme Court has yet ruled upon a case closely in point.

I am of the opinion that the line of authority first cited represents the best if not the majority view on the question.

I shall not attempt here to re-examine beyond what I have said the detail of reason going into the cited cases, I conclude in view of my evaluation of those reasons, the evidence before the court, and the controlling principles of law, that the enforcement of the regulations by suspension pending compliance in the context of these cases does not violate either the students' or the parents' fundamental rights of privacy, does not deny freedom of expression guaranteed and protected by the First Amendment, does not violate either procedural or substantive due process or the equal protection clause of the Fourteenth Amendment, that the regulations are not unconstitutionally vague, or overly broad, and that there is no basis for enjoining their application and enforcement in the schools involved here under existing circumstances.

Wherefore, this opinion being deemed sufficient as findings of fact and conclusions of law, pursuant to the requirements of Rule 52, F.R.C.P., it is now ordered that injunctive relief should be, and it is hereby, denied, and the actions of the plaintiffs dismissed, without costs.

LIBRARY
SUPREME COURT, U.S.
FEB 22 1972
CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-956

GREGORY A. CRANSON and RANDALL J. CRANSON, minors, by and through their natural guardian, WALTER N. CRANSON

Petitioners,

vs.

EAST OTERO SCHOOL DISTRICT R-1, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Benjamin L. Craig
Peter M. Eggleston
1415 Security Life Building
Denver, Colorado 80202

Ralph N. Wadleigh
Colorado Bank and Trust Building
P. O. Box 228
La Junta, Colorado 81050

Attorneys for Respondents

INDEX

	Page
OPINIONS	1
QUESTION PRESENTED	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	4
I. THERE IS NO BASIC CONFLICT IN THE DECISIONS OF THE CIRCUITS	4
II. PUBLIC SCHOOL HAIR REGULATIONS DO NOT PRESENT IMPORTANT CONSTITUTIONAL QUESTIONS	5
CONCLUSION	8

TABLE OF CASES.

Page

Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971) 5

Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. den. sub nom. Kahl v. Breen*, 398 U.S. 937 (1970) 5, 7

Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970) 5

Davis v. Firment, 408 F.2d 1085 (5th Cir. 1969) 4, 6

Dawson v. Hillsborough County, Florida, School Board, 445 F.2d 308 (5th Cir. 1971) 5, 6

Epperson v. Arkansas, 393 U.S. 97 (1968) 7

Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir.), *cert. den.* 393 U.S. 856 (1968) 4, 6, 7

Gere v. Stanley, —— F.2d ——, (3rd Cir. 1971, No. 71,1025) 4

Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971) 5

Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970) 5, 6

Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. den.* 400 U.S. 850 (1970) 5, 7

Karr v. Schmidt, 401 U.S. 1201 (Black, Circuit Justice, 1971) 6

King v. Saddleback Junior College District, 445 F.2d 932 (9th Cir.), *cert. den.* —— U.S. ——, 30 L. Ed. 2d 294 (1971) 5, 7

Livingston v. Swanquist, —— F.2d —— (7th Cir.), *cert. den. sub nom. Swanquist v. Livingston*, —— U.S. ——, 30 L. Ed. 2d 367 (1971) 5, 7

Massie v. Henry, —— F.2d —— (4th Cir. 1972, No. 15,325) 4

Page

Olff v. East Side Union High School District, 445 F.2d 932 (9th Cir. 1971), *cert. den.* 40 U.S.L.W. 3332 (1972) 5, 7

Pound v. Holladay, —— F.2d —— (5th Cir. 1971, No. 71-1434) 5

Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) 4

Rumler v. Board of School Trustees for Lexington County District No. 1, 437 F.2d 953 (4th Cir. 1971) 5

Stevenson v. Board of Education of Wheeler County, 426 F.2d 1154 (5th Cir.), *cert. den.* 400 U.S. 957 (1970) 5, 6, 7

Tinker v. Des Moines Community School District, 393 U.S. 503 (1969) 7

Whitsell v. Pampa Independent School District, 439 F.2d 1198 (5th Cir. 1971) 5, 6

Wood v. Alamo Heights Independent School District, 433 F.2d 355 (5th Cir. 1970) 5, 6

TABLE OF OTHER AUTHORITIES

Constitution of Colorado, Article IX, Section 15 2

Colorado Revised Statutes, 1963, 123-20-7 2

Colorado Revised Statutes, 1963, 123-30-10 2

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-956

GREGORY A. CRANSON and RANDALL J. CRANSON, minors, by and through their natural guardian, WALTER N. CRANSON

Petitioners,

vs.

EAST OTERO SCHOOL DISTRICT R-1, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions below are as set forth in the Appendix to the petition herein.

QUESTION PRESENTED

The question presented in the petition is not stated in terms of the circumstances of the case as required by the rules of this Court.

Stated in terms of the facts of this case the question is:

May a public school district in the state of Colorado constitutionally adopt and enforce rules and regulations gov-

erning the length of male students' hair when such rules and regulations are reasonably related to prevention of interference with the educational process and maintenance of decorum and discipline in its schools?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional provisions presented in the Petition for Certiorari, this case also involves:

Constitution of Colorado, Article IX, Section 15

> **School districts—board of education.**—The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.

Colorado Revised Statutes, 1963, 123-30-10

> **Board of education—specific powers.**—(1) In addition to any other power granted to a board of education of a school district by law, each board of education of a school district shall have the following specific powers, to be exercised in its judgment:
>
> (13) To adopt written policies, rules and regulations, not inconsistent with law, which may relate to study, discipline, conduct, safety and welfare of all pupils, or any classification thereof, enrolled in the public schools of the district.

Colorado Revised Statutes, 1963, 123-20-7

Grounds for suspension, expulsion, and denial of admission.—(1) (a) The following shall be grounds for suspension or expulsion of a child from a public school during a school year:

(b) Continued willful disobedience or open and persistent defiance of proper authority;

STATEMENT OF THE CASE

Petitioners Gregory A. Cranson and Randall J. Cranson were expelled by the respondent after an extensive hearing before its board of education wherein it was shown that they failed to comply with a regulation which prohibited boys from wearing their hair over the eyes, over the ears, or over the collar.

Prior to the hearing before respondents' board of education, petitioners initiated this action in the United States District Court for the District of Colorado alleging that the hair length regulation was unconstitutional and void as applied to them. They sought a temporary restraining order which was denied in an order dated October 13, 1970. The matter came to trial on October 21, 1970, and the District Court issued its Memorandum Order and Opinion on October 22, 1970 (Appendix to petition p. 36a). Therein the Court found that in 1968, the school adopted a regulation which did not restrict the length of male students' hair; that following the adoption of the regulation, decorum and discipline suffered from the resultant hair lengths; and that on December 12, 1969, a new regulation was adopted which prohibited the wearing of hair over the eyes, over the ears, or over the collar.

The District Court concluded from the evidence that the new regulation was neither arbitrary nor unreasonable because there existed a rational basis for its adoption in the interference with the educational process resulting from the breakdown of discipline and student attitudes of de-

fiance which existed during the time the more liberal regulation was in effect. The District Court held that the regulation did not violate the constitutional rights of the petitioners and dismissed their complaint and cause of action.

The United States Court of Appeals for the Tenth Circuit affirmed (Appendix to petition p. 1a).

ARGUMENT

I. THERE IS NO BASIC CONFLICT IN THE DECISIONS OF THE CIRCUITS.

Petitioners herein state as reasons for granting the writ that (1) there is a conflict among the circuits and (2) the issues proposed by hair regulations are profound.

Rule 19, Rules of the Supreme Court, provides that a review on writ of certiorari "will be granted only where there are special and important reasons therefor." Conflict in the decisions of the circuits on the same matter is one of the reasons to be considered by this Court in the exercise of its discretion whether to grant the writ, but the rule makes it clear that such conflict is neither controlling nor fully measures this Court's discretion.

Challenges to public school regulations affecting hair styles of male students have now been presented to the United States Courts of Appeal for the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, in addition to the Tenth Circuit through the instant case.[1]

---

[1] *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Gere v. Stanley*, —— F.2d —— (3rd Cir. 1971, No. 71-1025); *Massie v. Henry*, —— F.2d —— (4th Cir. 1972, No. 15,325); *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (5th Cir.), *cert. den.* 393 U.S. 856 (1968); *Davis v. Firment*, 408 F.2d 1085 (5th Cir. 1969);

The First, Fourth, Seventh, and Eighth Circuits have held for students while the Third, Fifth, Sixth, Ninth, and Tenth Circuits have held for public school officials.[2] Yet, when the facts are analyzed, any apparent conflict in the circuits is greatly diminished and "the differences in approach are more semantic than real."[3] In any event, this apparent conflict has been presented to this Court in previous petitions for certiorari and it has not chosen to exercise its discretionary authority to review.

II. PUBLIC SCHOOL HAIR REGULATIONS DO NOT PRESENT IMPORTANT CONSTITUTIONAL QUESTIONS.

Any decision in a case such as this is heavily dependent upon the facts surrounding the adoption, publication, and enforcement of the challenged regulation in the setting of

---

Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970); *Stevenson v. Board of Education of Wheeler County*, 426 F.2d 1154 (5th Cir.), *cert. den.* 400 U.S. 957 (1970); *Wood v. Alamo Heights Independent School District*, 433 F.2d 355 (5th Cir. 1970); *Whitsell v. Pampa Independent School District*, 439 F.2d 1198 (5th Cir. 1971); *Dawson v. Hillsborough County, Florida, School Board*, 445 F.2d 308 (5th Cir. 1971); *Pound v. Holladay*, —— F.2d —— (5th Cir. 1971, No. 71-1434); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir.), *cert. den.* 400 U.S. 850 (1970); *Gfell v. Rickelman*, 441 F.2d 444 (6th Cir. 1971); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. den. sub nom. Kahl v. Breen*, 398 U.S. 937 (1970); *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970); *Livingston v. Swanquist*, —— F.2d —— (7th Cir.) *cert. den. sub nom. Swanquist v. Livingston*, —— U.S. ——, 30 L. Ed. 2d 367 (1971); *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971); *King v. Saddleback Junior College District*, 445 F.2d 932 (9th Cir.), *cert. den.* ——U.S.——, 30 L. Ed. 2d 294 (1971) (*certiorari* was denied in the companion case of *Olff v. East Side Union High School District at* 40 U.S.L.W. 3332 (1972).

[2]However, the Court of Appeals for the Fourth Circuit has affirmed the denial of a student's motion for a preliminary injunction against the continuing enforcement of a school hair length regulation. *Rumler v. Board of School Trustees*, 437 F.2d 953 (4th Cir. 1971).

[3]*Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971).

the specific school.[4] Without question, entry by the federal courts into the complex process of operating public school systems would be of great significance.[5] This is not

---

[4]The strong dependency of each of these cases upon the particular factual setting in which it arises is amply demonstrated by the decisions in the Fifth Circuit. After six consecutive decisions of the Court of Appeals for that Circuit had affirmed the validity of school regulations such as those being challenged here (*Ferrell v. Dallas Independent School District*, 392 F.2d 697 (5th Cir.), *cert. den.* 393 U.S. 856 (1968); *Davis v. Firment*, 408 F.2d 1085 (5th Cir. 1969); *Griffin v. Tatum*, 425 F.2d 201 (5th Cir. 1970); *Stevenson v. Board of Education of Wheeler County*, 426 F.2d 1154 (5th Cir.), *cert. den.* 400 U.S. 957 (1970); *Wood v. Alamo Heights Independent School District*, 433 F.2d 355 (5th Cir. 1970); *Whitsell v. Pampa Independent School District*, 439 F.2d 1198 (5th Cir. 1971), a District Court decision striking down a hair length regulation was affirmed in a *per curiam* decision. This result was based upon the facts as presented to the trial court upon which the District Court determined, as a finding of fact, that there had been no necessity for the promulgation of the hair style restriction by the defendent school board. *Dawson v. Hillsborough County, Florida, School Board*, 445 F.2d 308 (5th Cir. 1971).

[5]The late Justice Black stated:

> "I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the States. And I furthermore refuse to predict that our Court will hold they have such power.
>
> * * * *
>
> And I cannot now predict this Court will hold that the more or less vague terms of either the Due Process or Equal Protection Clauses have robbed the States of their traditionally recognized power to run their school system in accordance with their own best judgment as to the appropriate length of hair for students.
>
> * * * *
>
> Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs.
>
> * * * *
>
> [It] would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 states."

Karr v. Schmidt, 401 U.S. 1201, 1202-1203 (Black, Circuit Justice, 1971)

the situation here. The Court of Appeals below has properly perceived and applied the law leaving the responsibility for the day-to-day operation of the public schools in the hands of the states.[6]

No significant national implications resulted when this Court declined to review other similar cases.[7] Each such case is of only local importance because each decision depends upon its unique factual setting. Accordingly, it would serve no useful purpose for this Court to repeat the basic proposition of constitutional law that federal courts have no jurisdiction to participate in the operation of public schools.

It is submitted that this Court has already determined the substantive question presented by this case by the distinction made in *Tinker v. Des Moines Community School District:*

> "The problem posed by the present case does not relate to the regulation of the length of skirts or the type of clothing, to hair style, or deportment. Cf. *Ferrell v. Dallas Independent School District,* 392 F.2d 697 (1968); *Pugsley v. Sellmeyer,* 158 Ark. 247, 250 SW 538 (1923). It does not concern aggressive, disruptive action or

---

[6]*Epperson v. Arkansas,* 393 U.S. 97, 104 (1968).

[7]*Ferrell v. Dallas Independent School District,* 392 F.2d 697 (5th Cir.), *cert. den.* 393 U.S. 856 (1968); *Stevenson v. Board of Education of Wheeler County,* 426 F.2d 1154 (5th Cir.), *cert. den.* 400 U.S. 957 (1970); *Jackson v. Dorrier,* 424 F.2d 213 (6th Cir.), *cert. den.* 400 U.S. 850 (1970); *Breen v. Kahl,* 419 F.2d 1034 (7th Cir. 1969), *cert. den. sub nom. Kahl v. Breen,* 398 U.S. 937 (1970); *Livingston v. Swanquist,* —— F.2d —— (7th Cir.), *cert. den. sub nom. Swanquist v. Livingston,* —— U.S. ——, 30 L. Ed. 2d 367 (1971); *King v. Saddleback Junior College District,* 445 F.2d 932 (9th Cir.), *cert. den.* —— U.S. ——, 30 L. Ed. 2d 294 (1971); and *Olff v. East Side Union High School District,* 445 F.2d 932 (9th Cir. 1971), *cert. den.* 40 U.S.L.W. 3332 (1972).

> even group demonstrations. Our problem involves direct primary First Amendment rights akin to 'pure speech'."[5]

Even if this distinction does not amount to a determination of the substantive issue in this case, the Court in *Tinker* apparently did not regard hair regulations as involving important constitutional questions.

CONCLUSION

School hair length regulations do not present profound constitutional issues and the conflict in the decisions of the circuits in such cases are more semantic than real.

For the foregoing reasons, respondents respectfully pray that the petition be denied.

Respectfully submitted,

Benjamin L. Craig
Peter M. Eggleston
1415 Security Life Building
Denver, Colorado 80202

Ralph N. Wadleigh
Colorado Bank and Trust Building
P. O. Box 228
La Junta, Colorado 81050

---

[5] *Tinker v. Des Moines Community School District*, 393 U.S. 503, 507-508 (1969).

LIBRARY
SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
FEB 29 1972
CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-956

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN; VERNON RANDALL OSTLER, a minor, by STEPHEN OSTLER, his father and natural guardian; MARCK CHARLES SIMMONS, by and through his guardian ROBERT C. SIMMONS, *Petitioners*,

—v.—

ALMON FLAKE, ET AL., *Respondents*.

AL WHITE, a minor, by his father, V. T. WHITE, *Petitioner*,

—v.—

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, ET AL., *Respondents*.

GREGORY A. CRANSON and RANDALL J. CRANSON, minors, by and through their natural guardian, WALTER N. CRANSON, *Petitioners*,

—v.—

EAST OTERO SCHOOL DISTRICT R-1, ET AL., *Respondents*.

GARY CHRISTMAS, a minor, by his father and next friend, WILLIAM R. CHRISTMAS, *Petitioners*,

—v.—

THE EL RENO BOARD OF EDUCATION, ET AL., *Respondents*.

RESPONSE OF THE EL RENO BOARD OF EDUCATION, ET AL., TO PETITION FOR WRIT OF CERTIORARI

---

of Counsel:
RUPERT M. FOGG
FOGG & FOGG
214 Citizens Nat'l Bank Bldg.
El Reno, Oklahoma 73036

RICHARD M. FOGG
FOGG & FOGG
214 Citizens National Bank Building
El Reno, Oklahoma 73036
HARVEY L. HARMON
FRANKLIN, HARMON & SATTERFIELD
1717 Fidelity National Building
Oklahoma City, Oklahoma 73102
Attorneys for Respondents, The El Reno Board of Education, et al.

February, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Statement of Case	2
Response to "Question Presented"	2
Response to "Reasons for Granting the Writ"	3
Conclusion	4
Certificate of Service	5

TABLE OF CASES

Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), cert. den., 398 U.S. 937 (1970)	3
Christmas v. The El Reno Board of Education, Independent School District No. 34, et al., 449 F.2d 153 (10th Cir. 1970)	3
Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), cert. den., 393 U.S. 856 (1969)	3
Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), cert. den., 400 U.S. 850 (1970)	3
Karr v. Schmidt, 401 U.S. 1201 (1971)	3
King v. Saddleback Junior College District, 445 F.2d 932 (9th Cir 1971), cert. den., 92 S.Ct. 342 (1971), 40 V.S.L.W. 3249 (1971)	3
Stevenson v. Board of Education of Wheeler County, Georgia, 426 F.2d 1154 (5th Cir. 1970), cert. den., 400 U.S. 957 (1970)	3

In the
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-956

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN; VERNON RANDALL OSTLER, a minor by STEPHEN OSTLER, his father and natural guardian; MARCK CHARLES SIMMONS, by and through his guardian ROBERT C. SIMMONS,

Petitioners,

—v.—

ALMON FLAKE, *et al.*,

Respondents.

AL WHITE, a minor, by his father, V. T. WHITE,

Petitioner,

—v.—

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, *et al.*,

Respondents.

GREGORY A. CRANSON and RANDALL J. CRANSON, minors, by and through their natural guardian, WALTER N. CRANSON,

Petitioners,

—v.—

EAST OTERO SCHOOL DISTRICT R-1, *et al.*,

Respondents.

GARY CHRISTMAS, a minor, by his father and next friend, WILLIAM R. CHRISTMAS,

Petitioners.

—v.—

THE EL RENO BOARD OF EDUCATION, *et al.*,

Respondents.

RESPONSE OF THE EL RENO BOARD OF EDUCATION, ET AL., TO PETITION FOR WRIT OF CERTIORARI

In response to the Petition for Writ of Certiorari filed by Petitioner and received by this Respondent on January 28, 1972, Respondent respectfully submits:

STATEMENT OF CASE

Petitioner, Gary Christmas, was graduated on May 22, 1970, from El Reno High School and was furnished a certificate of graduation and accompanying transcript which is the only official permanent school record evidencing graduation.

Christmas was not given a diploma, as he chose not to participate in the commencement exercise where diplomas are awarded. Christmas was not expelled, suspended or denied the right to his education.

The student petitioner Christmas appealed to the Court of Appeals for the Tenth Circuit. The Christmas case was argued and decided separately from the Freeman, Cranson and White cases. In affirming the District Court's decision denying injunctive relief, the Court of Appeals held that the facts of the *Christmas* case differed from the other three "hair" cases since Christmas was not suspended.

RESPONSE TO "QUESTIONS PRESENTED"

(Petitioner's Brief, page 3)

Petitioner has set forth the question "whether the state may constitutionally expel or punish male public school students whose hair length exceeds the limits prescribed by school officials." Petitioner's own limitation of the question does not traverse the settled facts in the *Christmas* case since nowhere in the record does it ever appear that the Christmas boy was expelled or punished.

RESPONSE TO "REASONS FOR GRANTING THE WRIT"

(Petitioner's Brief, page 9)

This Court has in the past denied certiorari in at least five "hair" cases, *Breen* v. *Kahl*, 419 F.2d 1034 (7th Cir. 1969) *cert. denied*, 398 U.S. 937 (1970); *King* v. *Saddleback Junior College District*, 445 F.2d 932 (9th Cir. 1971), *cert. denied* 92 S.Ct. 342 (1971), 40 U.S.L.W. 3249 (1971); *Jackson* v. *Dorrier*, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970); *Ferrell* v. *Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1969); *Stevenson* v. *Board of Education of Wheeler County, Georgia*, 426 F.2d 1154 (5th Cir. 1970), *cert. denied*, 400 U.S. 957 (1970).

In addition to the disposition of the cases above cited, Mr. Justice Black, sitting as an individual Justice assigned to the Fifth Circuit, in *Karr* v. *Schmidt*, 401 U.S. 1201 (1971), refused to interfere with the school authorities.

The attempted appeal by writ of certiorari of the Petitioners presents no issue more compelling than any advanced so far in the cases above cited, supra.

The Petitioners, by combining these cases in one petition for a writ of certiorari, do not recognize the clear factual distinction between this Respondent's case and all of the other so-called "hair" cases. As the Circuit opinion expressly says, "The facts differ from Freeman v. Flake and other hair cases decided this day in that the student *was not suspended . . . .*" *Christmas* v. *The El Reno Board of Education, Independent School District No. 34, et al.*, 449 F.2d 153 (10th Cir. 1971). (Emphasis supplied.)

This Respondent's case has no place in this combined appeal and certiorari should be denied on behalf of this Respondent.

CONCLUSION

For all of the above reasons, it is respectfully urged that the writ prayed for by Petitioners be denied.

RICHARD M. FOGG
FOGG & FOGG
214 Citizens National Bank Building
El Reno, Oklahoma 73036

HARVEY L. HARMON
FRANKLIN, HARMON & SATTERFIELD
1717 Fidelity National Building
Oklahoma City, Oklahoma 73102

Attorneys for Respondents,
The El Reno Board of Education, et al.

of Counsel:
RUPERT M. FOGG
FOGG & FOGG
214 Citizens National Bank Building
El Reno, Oklahoma 73036

February, 1972

CERTIFICATE OF SERVICE

I, RICHARD M. FOGG, Attorney for Respondents, do hereby certify that all parties required to be served have been served copies of the foregoing Response of The El Reno Board of Education, et al., To Petition for Writ of Certiorari on this _____ day of February, 1972. The following Attorneys for Petitioners,

Paul A. Phillips
520 Simms Building
Albuquerque, New Mexico 87101

Dan McKinnon, III
608 First National Bank Building
Albuquerque, New Mexico 87101

Stephen F. Williams
Fleming Law 205
University of Colorado
Boulder, Colorado 80302

Philip F. Horning
903 First National Bank Building
Oklahoma City, Oklahoma 73102

James N. Barber
716 Newhouse Building
Salt Lake City, Utah, 84111

Melvin L. Wulf
Joel M. Gora
American Civil Liberties Union
Foundation
156 Fifth Avenue
New York, New York 10010

have each been mailed three (3) true and correct copies thereof, first class postage prepaid, this _____ day of February, 1972.

RICHARD M. FOGG
Attorney for Respondents,
The El Reno Board of Education, et al.

LIBRARY

FILED
MAR 9 1972

IN THE

Supreme Court of the United States.

October Term, 1971

No. 71-956

AL WHITE, a minor, by his father, V. T. WHITE,

Petitioner,

VS.

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

MACK EASLEY
Counsel for Respondents
210 North Turner Street
P. O. Box 638
Hobbs, New Mexico 88240

INDEX

	Page
OPINIONS DELIVERED IN COURTS BELOW	1
QUESTION PRESENTED	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	3
I. REASONABLE RESTRAINTS ON STUDENTS' LIBERTY ARE NECESSARY	3
II. THE STATES, NOT THE FEDERAL COURTS, SHOULD RUN THE PUBLIC SCHOOLS	5
III. THE RIGHTS OF CHILDREN TO RELY ON CONSTITUTIONAL SAFEGUARDS ARE NOT THE SAME AS ADULTS	7
IV. PETITIONER HAS NO RIGHT UNDER THE CONSTITUTION TO WEAR HIS HAIR AT ANY LENGTH HE CHOOSES	8
CONCLUSION	8

TABLE OF CASES

Page

Breen v. Kahl, 296 F.Supp. 702 (W.D. Wisc.) aff'd 419 F.2d 1034 (CA 7, 1969), *cert. denied*, 398 U.S. 937 (1970) 5

Brown v. Board of Education of Topeka, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) 7

Cordova v. Chonko, 315 F.Supp. 953 (1970) 7

Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471, 484 (1965) 3

Davis v. Firment, 408 F.2d 1085 (CA 5, 1969) 8

Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228, 234 (1968) . . 3, 6

Ferrell v. Dallas Independent School District, 392 F.2d 697 (CA 5, 1968), *cert. denied*, 393 U.S. 859 (1968) 6, 8

Gfell v. Rickelman, 313 F.Supp. 364 (N.D. Ohio, 1970), aff'd 441 F.2d 444 (CA 6, 1971) 6

Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, 209 (1968) 7

Jackson v. Dorrier, 424 F.2d 213 (CA 6, 1970), *cert. denied*, 400 U.S. 850, 27 L.Ed.2d 88 8

Jeffers v. Yuba City Unified School District, 319 F.Supp. 368 (E.D. Cal., 1970) 6

Karr v. Schmidt, 401 U.S. 1201, 91 S.Ct. 592, 27 L.Ed.2d 797 (1971) 6

Page

King v. Saddleback Junior College, 445 F.2d 932 (CA 9, 1971), *cert. denied*, 40 U.S.L.W. 3249, 30 L.Ed.2d 294 8

Livingston v. Swanquist, 314 F.Supp. 1 (N.D. Ill., 1970) 6

Parker v. Fry, 323 F.Supp. 728 (E.D. Ark., 1970) . . . 6

Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 170, 64 S.Ct. 438, 88 L.Ed. 645, 654 (1944) 7

Sims v. Board of Education of Independent School District No. 22, 329 F.Supp. 678 (D.N.M., 1971) 7

Stevenson v. Board of Education of Wheeler County, 426 F.2d 1154 (CA 5, 1970), *cert. denied*, 400 U.S. 957, 27 L.Ed.2d 265, 91 S.Ct. 355 (1970) 8

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, 738 (1969) 3, 6, 7, 8

STATUTES

Section 77-4-2, N.M.S.A., 1953, Annotated 2

Section 77-10-2, N.M.S.A., 1953, Annotated 2, 7

OTHER AUTHORITIES

Constitution of New Mexico, Article XII, Section 5 . . . 2

17 *Encyclopedia Britannica* 637, 638 4

Spirit of Liberty, p. 189 3

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-956

AL WHITE, a minor, by his father, V. T. WHITE;

Petitioner,

VS.

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States District Court for New Mexico and the consolidated opinion of the United States Court of Appeals for the Tenth Circuit involving this case and others are contained in the Appendix to the Petition for a Writ of Certiorari.

QUESTION PRESENTED

The question as stated in the petition is framed too narrowly to fit our fact situation.

Under circumstances in a public school where the wearing of long hair by male students causes disruptions

and distractions that interfere with the teaching-learning process, may a state constitutionally, promulgate and enforce a rule to limit the length of male students' hair?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Supplementing the constitutional and statutory provisions set forth in the petition, attention is called to the following:

Article XII, Section 5, Constitution of New Mexico:

> "Every child of school age and of sufficient physical and mental ability shall be required to attend a public or other school..."

Section 77-10-2, N.M.S.A., 1953, Annotated:

> "Any person attaining six (6) years of age prior to January 1 of a school year and until attaining seventeen (17) years of age shall attend a public school, a private school...or a school offered by a state institution..."

Section 77-4-2, N.M.S.A., 1953, Annotated:

> "A local school board shall have the following powers or duties:
>
> "A. subject to the regulations of the State Board, supervise and control all public schools within the school district...
>
> "N. adopt regulations pertaining to the administration of all powers or duties of the local school board;..."

STATEMENT OF THE CASE

Additional facts should be brought out that are not stated in the petition. Numerous instances of friction

between students, disruptions, distractions of the students and teachers, violence and incidents bordering on violence were testified to by three administrators, twelve teachers and seven students for a total of twenty-two people from the school system. Teachers and school administrators with more than three hundred fifteen years of total experience testified that, in their opinion, long hair caused distractions and had an adverse influence on the teaching-learning process.

Although the Hobbs High School code made reference to neat and trim "conventional style haircuts," the more specific terms were announced at the beginning of each year, the teachers were instructed to review the code in their first classes of the year, and the code was reviewed at various times during the year over the intercom. The evidence leaves no doubt but that White knew of the specific rules and that the rules were uniformly enforced.

ARGUMENT

I. REASONABLE RESTRAINTS ON STUDENTS' LIBERTY ARE NECESSARY.

"The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471, 484 (1965). Judge Learned Hand in an address, the *Spirit of Liberty*, p. 189, expressed the view that freedom is not to do as one likes. It is not the ruthless, the unbridled will:

> "A society in which men recognize no check on their freedom soon becomes a society where freedom is a possession of only a savage few; as we have learned to our sorrow."

This Court has held that school officials must have comprehensive authority to control conduct in the schools. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d

731, 738 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228, 234 (1968).

Petitioners allude to several instances in history wherein leaders or governments have found it necessary or expedient to regulate the length and style of hair. However, no effort was made to show that the circumstances prevailing in each instance did not reasonably justify the action taken in the interest of an overriding public need.

Peter the Great was mentioned. In his attempt to recognize the requirements of the Russian Nation and fulfill his own obligations as a ruler, he was confronted with cumbrous, antiquated and worn-out machinery of government and took drastic steps to force westernization of his nation, including running "foul of the long beards and oriental costumes which symbolized the arch conservatism of Old Russia." 17 *Encyclopedia Britannica* 637,638.

Peter had seen the results of unrestrained liberty. Before he was ten "he saw one of his uncles dragged from the palace and butchered by a savage mob. He saw his mother's beloved mentor and his own best friend,... dragged bruised and bleeding, from his retaining grasp and hacked to pieces." (p. 637)

Petitioners' literal position is that the state cannot regulate in any manner the appearance or dress of any student and that any restraint in this regard unconstitutionally infringes upon his freedom, no matter what distractions, disruptions or violence it causes in the classroom for the other students and the teacher. To hold that the state cannot make a simple rule to prevent extremes in appearance that disrupt the education of its children is to say that the state can make no regulations that interfere in any degree with the personal freedoms of the individual student. If the "haircut rule" is an unconstitutional restraint on the student's freedom, a much better argument could be made that virtually imprisoning the child for a good part of his time for twelve years, forcing him to read books, prepare lessons and take examinations are much more severe encroachments upon his liberty. Following petitioners' logic, these restraints should also fall.

It is true, as petitioners allege (Pet. 11), that a number of the courts have looked upon long hair as a symbol of dissent and defiance of authority. However, there is no substance to petitioners' argument that the school authorities have attempted to regulate long hair merely because it represents an attitude of dissent. (Pet. 11) Most all of the cases that have held for the school authorities have found that the facts showed that wearing of extremely long hair by male students adversely affected the ability of the schools to educate their children, and that it interfered with the teaching-learning process.

The characterization of these rules as "state-imposed uniformity of appearance" by petitioners is not accurate. The schools' rules do not tell male students a given way to wear their hair. There is considerable leeway between a shaved head and hair that does not extend below the collar at the back, the eyes in front and over the ears on the sides. The proscription is against extreme hair styles that interfere with the student's own education and that distract other students from their courses of study.

Refusal of local school boards and administrators to throw the schools open to immature children from six to eighteen years of age with no restrictions at all as to their personal appearance, their state of dress or undress, cannot reasonably be said to be inimical to our constitutional traditions.

II. THE STATES, NOT THE FEDERAL COURTS, SHOULD RUN THE PUBLIC SCHOOLS.

What lies ahead for the courts, if petitioners prevail, is appalling. One court that favors the doctrine of *Breen v. Kahl*, 296 F.Supp. 702 (W.D. Wisc.) aff'd 419 F.2d 1034 (CA 7, 1969), *cert. denied*, 398 U.S. 937 (1970), was dubious about the "pat statement" in that case to the effect that there should be no fear of "opening flood gates to litigation" and was "overwhelmed by the possibilities of trying cases involving the in-school rights of third-graders to dress or wear their hair in a manner contrary to their schools' rules, or the determination of the limits upon the First Amendment rights of a

fifth-grader." *Parker v. Fry*, 323 F.Supp. 728 (E.D. Ark., 1970).

The state and local authorities should control the public schools; and the courts should not intervene in the daily operation of the schools unless conflicts "directly and sharply implicate basic constitutional values." *Epperson*, supra. Maintaining an effective and efficient school system is of "paramount importance." *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (CA 5, 1968), *cert. denied*, 393 U.S. 859 (1968). The citizens are "outraged if the schools are less than safe or orderly." (Judge Godbold, concurring specially in *Ferrell*) If public school students from kindergarten through high school can "defy and flout orders of school officials to keep their minds on their school work, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary." (Justice Black dissenting in *Tinker*)

In *Karr v. Schmidt*, 401 U.S. 1201, 91 S.Ct. 592, 27 L.Ed.2d 797 (1971), Justice Black, sitting as Circuit Justice, refused to vacate a stay of injunction pending the appeal of the case and had some strong statements to make regarding the idea of imposing on the United States Courts the burden of "supervising the length of hair that public school students should wear."

The local officials are keenly aware of the multitude of factors which may or may not affect the educational process. They are aware of the standards of conduct and behavior in the community where the school is located and which "may affect the way in which 'long hairs' will be accepted by their peers." *Jeffers v. Yuba City Unified School District*, 319 F.Supp. 368 (E.D. Cal., 1970); *Livingston v. Swanquist*, 314 F.Supp. 1 (N.D. Ill., 1970). Court interference could dilute the authority of the educational system and undermine the effectiveness of the teacher. "We have become a great nation because of the genius of the American educational system. Judicial interference...could sound the death knell of this system..." *Gfell v. Rickelman*, 313 F.Supp. 364 (N.D. Ohio, 1970), aff'd. 441 F.2d 444 (CA 6, 1971).

Education has been recognized by this Court as perhaps the most important function of state and local

governments. It is the foundation of good citizenship and is a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Sims v. Board of Education of Independent School District No. 22*, 329 F.Supp. 678 (D.N.M., 1971).

III. THE RIGHTS OF CHILDREN TO RELY ON CONSTITUTIONAL SAFEGUARDS ARE NOT THE SAME AS ADULTS.

Petitioners gave examples of historical restrictions on the length of hair and appearance that have applied to adults and cited cases proscribing discrimination against adults because of their appearance. (Petitioners' Brief, p. 10, 11, n. 5) The situations were not analogous to ours.

A child, "like someone in a captive audience," does not have the same capacity for individual choice under the constitutional guarantees as an adult. Justice Stewart, concurring in the result in *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, 209 (1968), expressed this opinion and ruled that a state may deprive children of other rights, the right to marry, the right to vote, which deprivations would be constitutionally intolerable for adults. *Tinker*, supra, 515; *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170, 64 S.Ct. 438, 88 L.Ed. 645, 654 (1944); *Cordova v. Chonko*, 315 F.Supp. 953 (1970), Justice Black's dissent in *Tinker*, supra, 747.

The practical difference is that an adult, upon seeing petitioner White on the street, would have the option to walk away. In the classroom dozens of other students who may be repulsed by his appearance are compelled by §77-10-2, N.M.S.A., 1953, to remain in the classroom with him.

IV. PETITIONER HAS NO RIGHT UNDER THE CONSTITUTION TO WEAR HIS HAIR AT ANY LENGTH HE CHOOSES.

White wanted to wear his hair long because he liked the way it looked. He made no claim that it was symbolic of any social, political or religious attitudes. Most of the Courts have denied First Amendment protection on fact situations like this. The Circuit Court in our case believed that *Tinker*, supra, eliminated hair style from any impact of that decision by stating specifically that "The problem posed...does not relate to...hair style..." Our Circuit Court further found that the wearing of long hair is not akin to pure speech:

The right of a student to determine his own hair length is not a matter of substantive due process. *Ferrell*, supra; *Gfell*, supra; *King v. Saddleback Junior College*, 445 F.2d 932 (CA 9, 1971), *cert. denied*, 40 U.S.L.W. 3249, 30 L.Ed.2d 294; *Jackson v. Dorrier*, 424 F.2d 213 (CA 6, 1970), *cert. denied*, 400 U.S. 850, 27 L.Ed.2d 88; *Stevenson v. Board of Education of Wheeler County*, 426 F.2d 1154 (CA 5, 1970), *cert. denied*, 400 U.S. 957, 27 L.Ed.2d 265, 91 S.Ct. 355 (1970); *Davis v. Firment*, 408 F.2d 1085 (CA 5, 1969).

In our case there was no evidence that the regulation was designed to control freedom of speech. The school authorities had a right to enforce a haircut code that was conducive to the fulfillment of their responsibility to educate the students. There is no showing in this case that the school authorities did not act reasonably and with consideration for the rights of petitioner and other students. The code did not infringe upon petitioner's rights under the due process clause of the Constitution.

CONCLUSION

The hair-cut code in this case does not directly and sharply implicate basic constitutional values. It is simply a tool of the teaching profession which is used to

maintain the discipline necessary to accomplish the aim of educating children. It is a matter of state and local concern. No substantial Federal question is involved.

These respondents request that the Petition be denied.

Respectfully submitted,
Mack Easley
Attorney for Respondents
P. O. Box 638
Hobbs, New Mexico 88240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-956

Supreme Court, U. S.
FILED
MAR 13 1972
MICHAEL RODAK, JR., CLERK

BILLIE K. FREEMAN, Guardian of TERRY FREEMAN; VERNON RANDALL OSTLER, a minor by STEPHEN OSTLER, his father and natural guardian; MARCK CHARLES SIMMONS, by and through his guardian ROBERT C. SIMMONS,

Petitioners,

—v.—

ALMON FLAKE, *et al.*,

Respondents.

AL WHITE, a minor by his father, V. T. WHITE,

Petitioner,

—v.—

BOARD OF EDUCATION OF HOBBS MUNICIPAL SCHOOL DISTRICT NO. 16, *et al.*,

Respondents.

GREGORY A. CRANSON and RANDALL J. CRANSON, minors, by and through their natural guardian, WALTER N. CRANSON,

Petitioners,

—v.—

EAST OTERO SCHOOL DISTRICT R-1, *et al.*,

Respondents.

GARY CHRISTMAS, a minor by his father and next friend, WILLIAM R. CHRISTMAS,

Petitioners,

—v.—

THE EL RENO BOARD OF EDUCATION, *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONERS

PAUL A. PHILLIPS
529 Simms Building
Albuquerque, New Mexico 87101

IAN McKINNON, III
605 First National Bank Building
Albuquerque, New Mexico 87101

STEPHEN F. WILLIAMS
Fleming Law 205
University of Colorado
Boulder, Colorado 80302

PHILIP F. HORNING
903 First National Bank Building
Oklahoma City, Oklahoma 73102

JAMES N. BARBER
716 Newhouse Building
Salt Lake City, Utah 84111
Of Counsel

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union Foundation
156 Fifth Avenue
New York, New York 10010
Attorneys for Petitioners

In the

Supreme Court of the United States

October Term, 1971

No. 71-956

Billie K. Freeman, Guardian of Terry Freeman; Vernon Randall Ostler, a minor by Stephen Ostler, his father and natural guardian; Marck Charles Simmons, by and through his guardian Robert C. Simmons,

Petitioners,

—v.—

Almon Flake, *et al.*,

Respondents.

Al White, a minor by his father, V. T. White,

Petitioner,

—v.—

Board of Education of Hobbs Municipal School District No. 16, *et al.*,

Respondents.

Gregory A. Cranson and Randall J. Cranson, minors, by and through their natural guardian, Walter N. Cranson,

Petitioners,

—v.—

East Otero School District R-1, *et al.*,

Respondents.

Gary Christmas, a minor by his father and next friend, William R. Christmas,

Petitioners,

—v.—

The El Reno Board of Education, *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONERS

The central issue in this case is the constitutionality of public high school regulations which govern the hair length of male students.

Each of the groups of respondents has filed a brief opposing the petition for *certiorari*. Essentially, three contentions are made: (1) that hair length regulations do not infringe upon constitutionally protected rights, (2) that federal courts should not interfere in the "day to day" operation of the schools, and (3) that there was no real conflict among the Circuits because each case was determined on its specific facts. The first two contentions merely reflect the quarrel over the proper rule of law, a dispute which the Tenth Circuit resolved in the respondents' favor, but which four other Circuits have resolved for the students' claims.

The third point raised—that petitioners have posited a false conflict among the Circuits and that the different results have been determined by different facts—is simply wrong. First, the Tenth Circuit itself noted that the Circuits "are sharply divided on the constitutionality of regulations pertaining to the length of the hair of male students in state public schools." Pet. for certiorari, p. 4a. Second, the court below did not even purport to examine the factual records in the four cases to determine whether the bases for the regulations were reasonable, let alone compelling. Had it done so, it would have been required to grapple with the findings made by the District Court in the New Mexico case (*White*) to the effect that no justification for the hair regulation had been shown. Instead, holding that the basic contentions of the students did not rise to a

constitutional dimension and should not be heard in a federal court, the court of appeals reversed in *White* and stated that all of the complaints should have been dismissed for failure to state a claim upon which relief could have been granted.

That holding is precisely what the dispute among the Circuits is all about. If, as four Circuits have held, school hair length regulations presumptively infringe basic or fundamental rights, then school authorities must make a certain type of showing to support the intrusion. On the other hand, if such rules do not "directly and sharply implicate basic constitutional values", then a lesser showing of necessity may be sufficient. But the conclusion that one reaches depends on the rule of law that is to be applied. And it is for the clarification of the proper rule of law that petitioners seek *certiorari*.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010
Attorneys for Petitioners

PAUL A. PHILLIPS
520 Simms Building
Albuquerque, New Mexico 87101

DAN MCKINNON, III
608 First National Bank Building
Albuquerque, New Mexico 87101

STEPHEN F. WILLIAMS
Fleming Law 205
University of Colorado
Boulder, Colorado 80302

PHILIP F. HORNING
903 First National Bank Building
Oklahoma City, Oklahoma 73102

JAMES N. BARBER
716 Newhouse Building
Salt Lake City, Utah 84111
Of Counsel

March 1972